NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

CARL ELSON SHRINER,

Petitioner,

vs.

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections,

Respondent.

83-5897

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the State "scrupulously honored" Petitioner's Fifth Amendment right to cut off questioning, where, after approximately eight hours of interrogation, Petitioner requested no further questioning and the interrogation merely stopped for a "minute or two" and then resumed without any additional Miranda warnings or waiver?

2. Whether the testimony of a priest who had witnessed an execution by electrocution should have been precluded from the jury as it denied Petitioner the benefit of the judgment of the community in violation of the Eighth Amendment?

3. Does the consideration of nonstatutory aggravating factors in imposing a sentence of death conflict with the reliability required for capital sentencing by the Eighth and Fourteenth Amendments?

4. Did the Eleventh Circuit err in upholding jury instructions that a reasonable juror might well have understood to preclude consideration of nonstatutory mitigating circumstances through:

(i) a disregard of Sandstrom v. Montana, 442 U.S. 510 (1979), thus creating a conflict with the Fifth Circuit's condemnation of identical jury instructions in Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982); and

(ii) a failure to recognize that instructional error under Lockett v. Ohio, 438 U.S. 586 (1978), infects a capital sentencing trial with prejudice sufficient to satisfy the requirements of Wainwright v. Sykes, 433 U.S. 72 (1977), and United States v. Frady, 456 U.S. 152 (1982)?

5. Does the failure of the Sentencing Court to set forth mitigating factors it found, deprive a defendant of the right to meaningful review?

6. Does the Florida Supreme Cout's systematic, secret, ex

parte solicitation and consideration of extra-record, prison-generated psychological evaluations and similar meterials of questionable reliability concerning capital appellants in cases pending before it for sentencing review violate the Fifth, Sixth, Eighth, and Fourteenth Amendments?

NO. _____

IN THE

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October Term, 1983

CARL ELSON SHRINER,

Petitioner,

vs.

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Petitioner, CARL ELSON SHRINER, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit filed September 9, 1983. Rehearing was denied on November 4, 1983.

CITATIONS TO OPINIONS BELOW

The opinion of the court of appeals is reported at 715 F.2d 1452 (11th Cir. 1983), and is set out at pages 1a-9a of the Appendix.*/ The order denying rehearing is noted at ____ F.2d ____ (11th Cir. 1983).

JURISDICTION

The judgment and opinion of the court of appeals were filed on September 9, 1982, and Petitioner's timely petition for rehearing was denied on November 4, 1983. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

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*/ Citations to the Appendix accompanying this Petition are designated ___a. Citations to the record of the state trial are designated by T.___. Citations to the transcript of the suppression hearing before the judge are designated by S.___.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the Constitution which provides in relevant part:

> No person...shall be compelled in any criminal case to be a witness against himself...;

the Sixth Amendment to the Constitutio which provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him...and to have the assistance of counsel for his defense;

the Eighth Amendment to the Constitution which provides in relevant part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;

and the Fourteenth Amendment to the Constitution which provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law....

It also involves Section 921.141, Florida Statutes (1973), which is set out at pp. 11a-12a of the Appendix.

STATEMENT OF THE CASE

A. Course of Prior Proceedings

Petitioner was convicted of first degree murder, and sentenced to die on April 29, 1977. His conviction was affirmed. Shriner v. State, 386 So.2d 525 (Fla. 1980), cert. denied, 449 U.S. 1103 (1981). He joined the class of death sentenced prisoners that unsuccessfully petitioned the Florida Supreme Court for relief based on that court's consideration of extra-record psychological material in affirming death sentences. Brown v. Wainwright, 392 So.2d 1327 (Fla.), cert. denied, 454 U.S. 1000 (1981).

Petitioner's execution was set for April 21, 1982. On April 13, he filed a writ of habeas corpus in the Northern District of Florida. It was denied. The Eleventh Circuit granted a stay

pending appeal on April 20, 1982. The panel opinion on the merits rejected Petitioner's claims. Shriner v. Wainwright, 715 F.2d 1452 (11th Cir. 1983). Rehearing was denied on November 4, 1983. Shriner v. Wainwright, ___ F.2d ____ (11th Cir. 1983).

B. Facts Relevant to the Questions Presented

(1) Petitioner's Challenge to the Admission of his Post-Arrest Custodial Statement at his State Court Trial.

The Petitioner, CARL ELSON SHRINER, was tried and convicted in the State of Florida for the capital offense of first degree murder, a robbery-killing of the night cashier of a Majik Mart food market, in Gainesville, Florida on October 22, 1976. Petitioner was sentenced to death on April 2, 1977 in the Alachua County Court.

There were no witnesses to the crime. Two women whom the State claimed were in the store just before the robbery-killing were unable to identify the Petitioner. (T, 445-456). A .38 caliber pistol - claimed by the State's ballistics expert to be the gun which caused death - was recovered from the house (S, 46-56) where Petitioner was living together with others.* What appeared to be the gun was depicted in a photo in which Carol Griffis appeared alone (T, 623-624) and Petitioner in his oral statement stated that the gun was stolen by someone other than the Petitioner and that it was often kept in Carol's car. (T, 692). There were no fingerprints at the scene or on the gun. (T, 507-620). The State's most incriminating evidence - and the sole evidence directly linking Petitioner to the killing - was the Petitioner's oral statement admitting the killing.

The defense argued that the gun belonged to Carol Griffis, with whom Petitioner was living, and that he had confessed to

*The police recovered .38 caliber bullets in the room which Petitioner was sharing with his friend, Carol Griffis. Carol Griffis consented to the search of the room, as did Petitioner. The Rapps consented to the search of the portion of the house where they lived. The gun was recovered in the Rapp's children's room. (S, 46-53).

protect her from prosecution.* (T, 759-770-771). The defense called no witnesses. Prior to trial the defense moved to suppress the Petitioner's incriminating statement and other incriminating evidence, and the trial court denied the motion (S, 23-24,63,144).

While on patrol duty at approximately 4:15 p.m. Deputy Denson stopped the car in which Petitioner was a passenger for the sole reason that Petitioner bore a "striking resemblance" to the suspect described in a bulletin, in connection with two recent robberies and a robbery-killing. (S, 7). After giving Miranda warnings, Denson proceeded to conduct a field interview which consisted of questioning the Petitioner with respect to his name, address, occupation and social security number. (S, 8,16, T, 557). Petitioner was cooperative, unevasive and responded to all questions. (T, 561). He identified himself and produced a valid Florida driver's license that showed his present address in Gainesville. (S, 16,17).

After consultation with two other law enforcement persons who responded to the stop, it was decided to take Petitioner to the station "for questioning". (S, 9,10).

Petitioner was questioned by numerous officers from 4:30 p.m., when he arrived at the Alachua Sheriff's office, until 7:30 p.m., when he was taken to the Gainesville Police Department for more intensive questioning concerning the robbery-killing at the Majik Mart. (S, 113,114). He was questioned on the Eight Days Inn robbery and Majik Mart robbery-killing during this period and denied any knowledge of either event. During this period at the Sheriff's station house, Petitioner was advised of his Miranda warnings on a single occasion-at 5:06 p.m. (S,123-124; T,568-569)

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* This defense was supported by the fact that prior to 2:00 a.m. on the morning of interrogation, Petitioner had maintained that he had stayed in the car while John Rapp and Carol Griffis entered the Majik Mart at the time of the robbery-killing.

Although Petitioner was allegedly charged with the Eight Days Inn robbery at the Sheriff's office shortly after 5:06 p.m., he was not booked at the jail on that charge until 4:00 a.m. the next morning, after he had confessed to the Majik Mart robbery-killing and to the Eight Days Inn robbery. (S, 123-124). Petitioner testified at the suppression hearing that upon arrival at the Sheriff's office he was placed at a desk and told to write down everything he had done during the past four days. (RRS, 5). He was told by an officer that if he cooperated "this whole thing could be settled and I could be on my way." (RRS, 97). Thereafter, Petitioner was questioned incessantly at the Gainesville Police Department for over eight hours - from his arrival at approximately 7:30 p.m. until approximately 4:00 a.m. when he was booked.

At the Gainesville Police Department Petitioner was advised of his Miranda warnings, however, they were given solely in the context of advising Petitioner of his rights with respect to submitting to a polygraph test. (S, 69,85,86). This was the last time that Petitioner was to receive the Miranda warnings in any context.

Petitioner testified that early that night at the police station a "Detective Price" tried to question him about the murder and that he responded that he did not want to talk to him and that he wanted an attorney present. (RRS, 92). During this discussion the detective stated that he knew that Petitioner had killed "that woman" and was "going to get me the electric chair."* (RRS 92,99). Petitioner stated that he requested an attorney several times that night. (RRS, 92-93).

The police began intensive questioning about the Majik Mart robbery-murder and the Eight Days Inn robbery upon completion of the polygraph test. No additional Miranda warnings were given. The primary interrogators were Police Sgt. Blitch and Assistant State Attorney Nilon. All of the interrogation occurred in the

10' x 10' polygraph room while Petitioner was cuffed to the chair. (S, 67-68). Except to go to the bathroom, Petitioner did not leave that room between 9:00 p.m. and 3:30 a.m.

Petitioner told four distinct versions of events during the period of interrogation between 7:30 p.m. and 4:00 a.m. (1) Petitioner denied any knowledge of the Majik Mart robbery-killing and the Eight Days Inn robbery from 4:30 p.m. until after completion of the polygraph test - sometime between 9:17 p.m. and 10:15 p.m. (S, 70-114-115). (2) Thereafter, Petitioner stated that he knew something about the Majik Mart incident and that "they" did it. He further elaborated that, not knowing at the time what had happened, he had remained in the car with the windows up listening to the stereo while "they" entered the Majik Mart on the morning of the robbery-killing and later returned to the car. Petitioner stated that he subsequently learned, through the media, that a robbery-killing occurred there that night. Petitioner refused to state who "they" were. At this time Sgt. Blitch was questioning Petitioner. (S, 72-74). (3) At 11:30 p.m., still pursuant to questioning by Sgt. Blitch, Petitioner stated that "they" were John Rapp and Carol Griffis, who resided at the same address as Petitioner. Carol was Petitioner's girlfriend with whom he was sharing a room at the house. Petitioner admitted that he committed the Eight Days Inn robbery later the same night, after one of the others in the car gave him the gun.** (S, 75,92). (4) Finally, at 2:00 a.m., while being questioned by Sgt. Blitch alone, Petitioner stated that he alone had robbed the Majik Mart and shot the cashier.

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* This conversation, according to Petitioner, occurred shortly after Petitioner arrived at the Gainesville Police Department. Detective Price, in rebuttal, denied that he made the statement concerning the electric chair and denied that Petitioner had asked him for an attorney. (S, 127). He stated that he saw the Petitioner for the first time at 2:30 a.m. (S, 128).

** Petitioner refused to state who handed him the gun.

Petitioner was also questioned further with respect to the Eight Days Inn robbery by Blitch alone and by Blitch and Nilon. (T, 685-686) (T, 714, 725-726). Interrogation ceased at approximately 3:45 a.m. and Petitioner was thereafter booked for both charges. (S, 79-80).

Immediately after the third version, wherein Petitioner identified Carol Griffis and John Rapp as the persons who went into the Majik Mart, Sgt. Blitch recommended that Petitioner repeat this statement to Assistant State Attorney Nilon "to hear his side or the story in case they [Carol Griffis and John Rapp] might be arrested at a later date and try to pin it on him." (S, 76,94). Petitioner acquiesced. Nilon came in and Petitioner repeated the statement to Nilon and Blitch. (S, 76).

At 12:15 a.m. on October 23, (S, 78) Sgt. Blitch left the Petitioner alone with Assistant State Attorney Nilon who continued the interrogation. Sgt. Blitch did not return until 1:30 a.m. (S, 78).

When Assistant State Attorney Jim Nilon first spoke to Petitioner, around 11:30 - 11:45 p.m. (S, 92), Petitioner told him to not take any notes. (S, 96). Nilon never informed the Defendant that anything Petitioner stated orally would and could be used against him. Instead, Nilon simply complied with Petitioner's request, and put his pad down. (S, 104,106).

Petitioner made several futile attempts to exercies his Fifth Amendment privilege to cut-off questioning. Sgt. Blitch testified at the suppresssion hearing as follows:

> Q. Did he [Petitioner] ever ["during that time from nine o'clock until two thirty a.m...."] tell you he wanted to stop talking or remain silent?
>
> A. No sir, he did not. At times he would say, "Well, I'm not going to answer that", but later he would come back and usually he would give me more than I really anticipated." (S, 90).

The testimony of Assistant State Attorney Nilon reflects that Petitioner futilely tried to cut-off questioning. During

the first interrogation with Nilon alone, which began at approximately 12:15 a.m., after Petitioner stated who "they" were, Petitioner told Nilon that he did not want to answer further questions. At this point in time Petitioner had been under interrogation for eight hours.

The record at the suppression hearing reflects the following testimony on Nilon's direct examination:

> Q. Did he ever ask to stop talking or remain silent?
>
> A. Yes, to a certain extent. What he did, in the first conversation that I had with him afer Investigator Blitch had left the room particularly in reference to the Eight Days Inn robbery, he told me certain things that had happened in the Eight Days Inn robbery and when I asked him particularly about the gun that he used in the Eight Days Inn robbery he said to me something to the effect, "Well, right now it's like I'm crazy. It's like I'm nuts." I said, "Well, Mr. Shriner..." I don't remember what I said but I said "It's not like you mean you are insane." He said, "No." I said "You mean you don't want to answer any more questions?" And he said, "Yes". I just sat there for a minute. I think at that point I asked him something about his family background and he answered that, and that's the only time I can think of he even alluded to the fact that he didn't want to answer any questions or make any further statements or anything." (S, 102).

At the trial, on direct examination, Assistant State Attorney Nilon re-confirmed that Petitioner at one point, had refused to answer further questiosn:

> Q. Why did you talk -- allright. At some point he quit giving you specifics about that evening?
>
> A. Yes.
>
> Q. All right. The topic changes?
>
> A. Yes, we start talking about his personal life, his family. (T, 709,710).

On cross-examination at trial, however, Nilon changed his testimony. His question to Petitioner was no longer whether Petitioner did not want to make "any further statement..." (S, 101), but rather whether Petitioner wanted to make no further statement "about that". (T, 721). Moreover, whereas at the suppression hearing the area of questioning which immediately

preceded this conversation concerned the gun used in the Eight Days Inn robbery (S, 101), at trial Nilon stated that it was questioning concerning Petitioner signing his parents' Phoenix, Arizona street residence to the motel registration folio immediately before the Eight Days Inn robbery. (T, 721).

Confronted with Petitioner's assertion of the Fifth Amendment, Nilon did not advise Petitioner of his Miranda advices but, instead, simply stopped questioning on both offenses momentarily and then immediately resume questioning on another area. (T, 722, 723). Questioning continued, and one and one-half hours later the police finally got a confession.

The Petitioner testified at the suppression hearing that he requested an attorney several time that night and requested no further questioning. (RRS, 92, 93). Petitioner testified that he could not recall telling Sgt. Blitch and Assistant State Atorney Nilon that he did not want to talk about the crimes without a lawyer, but he stated that he did recall making that request to others who spoke to him. (RRS, 100-101, 103-103). Petitioner testified that he was unable to recall "half of the statements...that I was supposed to have said." (RRS, 94). Throughout the twelve hours of questioning Petitioner stated that he "kept asking for coffee", and was given a couple of cups. (RRS, 95). Petitioner stated that he made the statements because he was "tired and upset" and because they were holding Carol whom the police told him was under arrest for the murder and other offenses. (RRS, 94, 105).

The Eleventh Circuit affirmed the denial of the motion to suppress on the basis of what Prosecutor Nilon had thought Petitioner's intent was concerning questioning. 715 F.2d at 1454. The Eleventh Circuit concluded that the record "fairly supported" the state court's finding that Petitioner merely wanted to limit the subject matter, not end all questioning, even though the record showed that Prosecutor Nilon had simply

"guessed" at Petitioner's intent rather than make any inquiry to clarify it. Prosecutor Nilon's "guess" was not consistent with Petitioner's interests.

2. The exclusion of testimony of a clergyman who had witnessed an execution precluded Petitioner the benefit of the judgment of the community in violation of the Eighth Amendment.

Petitioner was not allowed to present to the jury a clergyman who had witnessed an electrocution, on the grounds that it was irrelevant. (T, 870).

As set forth in the Eleventh Circuit's decision, Lockett v. Ohio, 438 U.S. 586 (1978), stated that its rule is limited by notions of relevancy. But is "relevancy", for Lockett purposes, defined in terms of state evidence law or in terms of a federal standard drawn from the rationale of Lockett? Green v. Georgia, 442 U.S. 95 (1979), which held that the due process clause bars trial judges from rigidly applying local hearsay rules to exclude evidence admissible under Lockettt, suggests that a federal standard must be applied. Thus it isn't enough to say the evidence, to-wit: clergyman's testimony regarding electrocutions, was irrelevant under Florida law. The issue is whether it was relevant to the task which a capital jury must perform. The issue of whether the applicable standard of relevancy would be the local relevancy rule or a federal standard down from the Eighth Amendment needs to be addressed and resolved.

3. Consideration of non-statutory aggravating factors in imposing a sentence of death conflicts with the reliability requirements for capital sentencing.

Jury Consideration of Nonstatutory Aggravating Factors

At the advisory hearing on sentence the jury was instructed that:

> "Your advisory sentence should be based upon the evidence which you have heard while trying the guilt or innocence of the Defendant and evidence which has been presented to you in the proceedings." (T, 898).

At the advisory hearing on sentencing, the prosecutor argued to the jury that they could consider in aggravation that Petitioner "create a great risk of death to many people" by virtue of having committed the separate offense of robbing the Eight Days Inn, and coming close to killing the hotel clerk (T, 883). This was clearly outside of what the jury could have properly considered. Elledge v. State, 346 So.2d 998 (Fla. 1977); Provence v. State, 337 So.2d 783 (Fla. 1976).

Next, over objection, the trial court allowed the prosecutor to argue that all deaths, including the instant offense, to a civilized human being, are heinous, atrocious, and cruel if they are unlawful deaths. (T, 884). Such argument of statutory factors was improper, and incorrect as a matter of law. State v. Dixon, 283 So.2d 1 (Fla. 1973), Kampff v. State, 371 So.2d 1007 (Fla. 1979); Mines v. State, 390 So.2d 332 (Fla. 1980). Additionally, the prosecutor improperly argued the nonstatutory factors of the propriety of the death sentence, its deterrent effect, and his personal opinion as to both. (T, 875-880).

The effect of the jury charge herein was to instruct the jury to consider everything they heard, includin the nonstatutory aggravating circumstance of the Eight Days Inn robbery and the clerk's narrow escape from death.

Judicial Consideration of Nonstatutory Aggravating Circumstances

In imposing death, the trial judge expressly found and considered the following nonstatutory aggravating circumstances: (1) Petitioner's extensive juvenile delinquency record between 1963 and 1982, (2) Petitioner's extensive prison disciplinary record between 1972 and 1976, (3) the "likely" commission of other robberies for which Petitioner was not convicted, (4) Petitioner's repeated self-inflicted wounds, in apparent suicide attempts, while awaiting trial, and (5) Petitioner twice asking the jury to recommend death (TS, 10-14; Written Sentence RR, 44-

47).

On appeal the Florida Supreme Court stated:

> "It is not clear, however, whether the judge considered appellant's disciplinary record as an aggravating circumstance. Even if we assume that the disciplinary problem was so treated, the error was harmless." Shriner v. State, 386 So.2d 525 at 534 (Fla. 1980).

In light of Barclay v. Florida, ____ U.S. ____, 103 S.Ct. 3418, 77 L.Ed 2d 1134 (1983), the Eleventh Circuit stated it was helpless to overturn this "harmless error" determination. 715 F.2d at 1458.

4. Petitioner's Challenge to Instructions That Might Well Lead a Reasonable Juror to Conclude that the Jury was Forbidden to Consider Relevant Mitigating Circumstances.

This issue is substantially similar to the question presented in Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983) (en banc), cert. denied. In this case, the instructions to the jury at the penalty phase were that:

> The aggravating circumstances which you may consider are limited to such of the following as may be established by the evidence....[The court listed the statutory aggravating circumstances]
>
> The mitigating circumstances you may consider if established by the evidence are as follows....[The court listed the statutory mitigating circumstances] (T, 897,898).

Unlike Ford, however, there is nothing in this record that suggests that the trial judge considered nonstatutory mitigating factors, that he understood they could be considered, or that such an impression was conveyed to the jury. In fact, the trial judge stated at sentencing that he could find no mitigating circumstances using the statutory guidelines established by the legislature. (TS 12, 13).

The trial judge limited his consideration of mitigating factors based upon his belief that as a matter of law, consideration of mitigating factors was limited to only those specifically enumerated in Florida Statute §921.141(6). (RR, 44-47). Specifically, the trial judge's written findings in support

of death included:

> The Court finds, with the possible exception of No. 6 above, there are no mitigating circumstances in this case. An examination of the psychiatric evaluation in this case, found both in the presentence investigation from the Department of Offender Rehabilitation and by the various psychiatrists appointed to representthis Defendant prior to trial, he has been diagnosed as a "sociopathic personality". An examination of these reports, however, does not lead one to the conclusion that his capacity is diminished thereby.
>
> The Court finds that the aggravating circumstances far outweigh the mitigating circumstances. (RR, 46).

The "No.6" referred to was Fla. Stat. §921.141(6)(f), of a mitigating circumstance reading:

> "Whether the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirement of law was substantially impaired."

There was no contemporaneous objection to these instructions. In federal habeas, Petitioner argued that he had not committed a procedural default because the instructions were consistent with Florida law and federal constitutional doctrine as they existed at that time. Under Cooper v. State, 336 So.2d 1133 (Fla. 1976), Florida law limited consideration to statutory mitigating circumstances. See Barclay v. Florida, ____ U.S. ____, 103 S.Ct. 3418 , 77 L.Ed.2d 1134 (1983); Perry v. State, 395 So.2d 170, 174 (Fla. 1981) (in excluding nonstatutory mitigating evidence under Cooper, trial judge "followed the law as he believed it was being interpreted at the time of trial"). Petitioner's trial was held before the decisions in Lockett v. Ohio, 438 U.S. 586 (1978), and Songer v. State, 365 So.2d 696 (Fla. 1978), which set the matter straight as a matter of both Florida and federal constitutional law.

5. The Sentencing Court's failure to set forth mitigating factors it found, deprived Petitioner of the right to a meaningful review.

The trial court's sentencing order failed to consider nonstatutory mitigating factors and failed to set forth mitigating factors it may have found. The sentencing order read:

"The Court finds that the aggravating circumstances far outweigh the mitigating circumstances."

The Eleventh Circuit decision notes that:

"There is no indication that the Florida Supreme Court limited its review to the absence of only statutory mitigating circumstances. Indeed, the Court specifically holds '[t]he record also supports the finding of no mitigating circumstances.' Shriner v. State, 386 So.2d 525, 534 (Fla. 1980)." 715 F.2d at 1458.

The decision fails to acknowledge that the Florida Supreme Court was only addressing statutory mitigating factors.

6. Petitioner's Challenge to the Florida Supreme Court's Ex Parte Solicitation, Receipt, and Consideration of Evaluative Materials Concerning Capital Defendants Whose Appeals Were Before the Court:

Since at least as early as 1975, the Supreme Court of Florida has, without the knowledge of the appellants or their counsel, requested, received, and considered materials from prison officials relating to death-sentenced appellants in pending appeals. The existence of this practice has never been disputed.

Mr. Shriner was one of the petitioners in the original habeas filed in the Florida Supreme Court. Brown v. Wainwright, 392 So.2d 1327 (Fla.), cert. denied, 454 U.S. 1000 (1981). The Eleventh Circuit rejected Mr. Shriner's Brown claim based on the decision in Ford v. Strickland 696 F.2d 804 (11th Cir. 1983), cert. denied. 715 F.2d at 1457. In addition, the Eleventh Circuit denied Mr. Shriner's discovery request to seek proof that nonrecord information had been used in his direct appeal.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS MISAPPLIED THE DECISIONS OF THIS COURT AND CREATED CONFLICT WITH PRIOR APPELLATE DECISIONS WHEN IT UPHELD THE ADMISSION OF PETITIONER'S POST-ARREST CUSTODIAL STATEMENT ON THE FINDING THAT PETITIONER'S RIGHT TO CUT-OFF QUESTIONING WAS "SCRUPULOUSLY HONORED" EVEN THOUGH PETITIONER'S CLEAR REQUEST TO HAVE QUESTIONING CEASE REFLECTED AN "AMBIGUOUS" DESIRE TO REMAIN SILENT.

This case presents important questions concerning the application of this court's decisions in Miranda v. Arizona, 384

U.S. 436 (1966), and Michigan v. Mosley, 423 U.S. 96 (1975), and Nash v. Estelle, 597 F.2d 513 (5th Cir. 1979), and Thompson v. Wainwright, 601 F.2d 768 (5th Cir. 1979).

State Prosecutor Nilon asked, "You mean you don't want to answer any more questions?" Petitioner said, "Yes." Prosecutor Nilon "thought" Petitioner wanted questioning to terminate only in relation to the robbery. So a few minutes later Prosecutor Nilon asked about Petitioner's family, and the interrogation resumed.

On its face, Petitioner's request was not ambiguous. It was a clear request that questioning stop. Ambiguity arose when Prosecutor Nilon weighed in his mind what Petitioner was requesting, rather than simply terminate questioning pursuant to Petitioner's request. Prosecutor Nilon, perhaps in furtherance of the investigation, concluded that Petitioner's request was to terminate questioning only as to the robbery but not as to the murder. If that was Petitioner's intent, why didn't Petitioner say "I don't to talk about the robbery, but I'll tell you about the murder."? Instead, Prosecutor Nilon simply chose to decide what Petitioner meant rather than make inquiry.

The Eleventh Circuit relied upon and adopted the state court finding that Petitioner merely wanted to limit the subject matter, not end all questioning. 715 F.2d at 1455. It is strongly urged that the type of interrogation and conduct of the prosecutor in this case falls far short of "scrupulously honoring" Petitioner's Fifth Amendment right to cut-off questioning. At the very least, to get from the words Petitioner said to the construction placed upon them by the Eleventh Circuit Court required a leap of inference that suggests that Petitioner's request was "ambiguous". The Eleventh Circuit's failure to independently review this mixed question of law and fact has simply allowed this error to progress one step further.

In Miranda, supra, the Court recognized an accused's right to cut-off questioning before and during interrogation:

> "If the individual indicates in any manner at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease;... without the right to cut-off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked." Miranda v. Arizona, supra, 384 U.S. at 473-474.

The Court, in Michigan v. Mosley, supra, construed this passage of Miranda. The Court rejected the interpretation that this proscription precluded further interrogation under any circumstances. In so doing, however, the Court similarly rejected an interpretation at the other extreme, that would permit recurring rounds of questioning, which is what occurred here.

> "To permit the continuation of custodial interrogation after a momentary cessation would clearly frustrate the purposes of Miranda by allowing repeated rounds of questioning to undermine the will of the person being questioned." Michigan v. Mosley, supra, 423 U.S. at 102.

The Court held that in such cases the test of admissibility is whether the authorities "scrupulously honored" the accused's right to cut-off questioning:

> "We...conclude that the admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether this 'right to cut off questioning' was 'scrupulously honored.' (footnote omitted) Michigan v. Mosley, supra, 423 U.S. at 104.

The facts in Petitioner's case do not meet that test.

In Michigan v. Mosley, 423 U.S. 96 (1975), a defendant who had been arrested in connection with certain robberies and advised of his rights pursuant to Miranda, chose not to discuss the robberies, and accordingly interrogation was ceased. Not until two (2) hours later, however, and after being given Miranda warnings again by another detective, the defendant was questioned solely about another unrelated crime, whereupon the defendant made an inculpatory statement. The Court held this statement to

be admissible because the defendant's right to cut-off questioning had been scrupulously honored in that the police had immediately ceased the robbery interrogation when the accused invoked the Fifth Amendment. Mosley was placed in a detention cell and not questioned again until two (2) hours later, after fresh Miranda warnings and a clear waiver.

A reasonable and faithful interpretation of Miranda was concluded to encompass adoption of "fully effective means...to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored..." Michigan v. Mosley, supra. Therefore to permit the continuation of custodial interrogation after only a momentary cessation would clearly frustrate the purposes of Miranda by allowing repeated rounds of questioning to undermine the will of the person being questioned. Michigan v. Mosley, supra.

Here, questioning merely stopped momentarily and then immediately resumed after shifting to the innocuous area of Petitioner's family background. Later, the interrogation was brought back to the homicide and a confession was ultimately obtained. No new Miranda warnings were issued. No waiver inquiry was conducted. Petitioner's requests for counsel were ignored. No Miranda warnings were ever given for the murder of Judith Ann Carter.

The record at the suppression hearing reflects that Petitioner requested all questioning to cease, and the Petitioner's affirmative response to the question "Do you mean you don't want to answer any more questions?" was clearly the exercise of his Fifth Amendment privilege to stop the interrogation. Equally clear is that the record here is one of scrupulous disregard and indifference to Petitioner's Miranda rights and that the type of conduct employed in interrogating Petitioner was that condemned in Mosley and should not be permitted to stand.

While Petitioner contends his request to cut-off questioning was clearly communicated to Prosecutor Nilon, certainly Petitioner's request was at the least, "ambiguous". Presently, it is not set forth what standard a court should use to decide whether a request is "ambiguous", but certainly the test used by the Eleventh Circuit, to-wit: "What the officer thought" (Prosecutor Nilon), is a subjective, meaningless standard which has no basis in the law. Consequently, this issue needs to be resolved and the "test" needs to be spelled out.

Assuming Petitioner's request was ambiguous, what is the scope of questioning that is permissible after that point? Nash v. Estelle, 597 F.2d 513 (5th Cir. 1979), and Thompson v. Wainwright, 601 F.2d 768 (5th Cir. 1979) held that following an equivocal request for counsel, further questioning was limited to clarify the request. Petitioner's request dealt with his right to remain silent.

The Eleventh Circuit's decision fails to indicate whether the Nash - Thompson requirement of clarifying equivocal requests for counsel apply to requests to remain silent. This leaves unresolved whether the standards for invoking these different rights are the same. Do Nash and Thompson mandate that after an ambiguous statement that might be construed as a request to cut-off questioning then subsequent questioning is limited to attempting to determine what the suspect was trying to say? In Petitioner's case, no effort was made to clarify Petitioner's request, questioning simply resumed.

The Eleventh Circuit avoided this substantial question by adopting the state court's finding that Petitioner merely wanted to limit the subject matter, and not end all questioning. Petitioner strongly urges that the record did not "fairly support" this factual determination, and that it is a mixed question of law and fact that this Court needs to review.

II. THE COURT SHOULD GRANT THE WRIT TO DETERMINE WHETHER THE EXCLUSION OF TESTIMONY OF A CLERGYMAN WHO HAD WITNESSED AN EXECUTION PRECLUDED PETITIONER THE BENEFIT OF THE JUDGMENT OF THE COMMUNITY IN VIOLATION OF THE EIGHTH AMENDMENT.

The testimony of the clergyman was relevant to the "evolving standards of decency" embodied in the Eighth Amendment. This Eighth Amendment relevancy was not addressed in Lockett, but the Eleventh Circuit interpreted Lockett as excluding this evidence as irrelevant, since it did not bear on the defendant's character, record, or offense.

The 1976 cases held that capital punishment may be imposed constitutionally only because it comports with public attitudes and because it might serve specific penalogical purposes. Because an execution that offends public attitudes or that does not serve valid purposes is unconstitutional, compliance with the Eighth Amendment requires that the capital jury be permitted to hear any evidence tending to prove that the penalty, execution by electrocution, is appropriate.

The "evolving standards of decency" discussed in Gregg v. Georgia, 428 U.S. 153 (1976) is critical at two stages in the legal process of deciding who dies: at the legislative level, when the issue is what classes of people may be put to death and at the capital sentencing level, when the issue is who will be put to death. Initially, the legislature decides whether electrocution will offend the dignity of a civilized society. But the legislature isn't the exclusive repository of the nation's evolving standards of decency. The capital jury which, like the legislature, is a medium of public attitudes towards the death penalty, must apply these standards in any given case.

The role of the jury as "conscience of the community", is to be an informed conscience. Thus, evidence can not be excluded so long as it "gives the jury accurate information". California v. Ramos, ____ U.S. ____, 103 S.Ct. 3455, 77 L.Ed.2d 1171 (1983). Evidence of what the penalty of death means and how it is carried

out, will help the jury in deciding whether execution of this defendant would offend evolving standards of decency.

III. THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER CONSIDERATION OF A NON-STATUTORY AGGRAVATING FACTOR IN IMPOSING A SENTENCE OF DEATH CONFLICTS WITH THE RELIABILITY REQUIREMENTS FOR CAPITAL SENTENCING.

The court below held that the improper consideration of a non-statutory aggravating factor did not rise to the level of a constitutional violation requiring federal habeas corpus relief. 715 F.2d at 1459. This holding was based upon Barclay v. Florida, ____ U.S. ____, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983), and that it appeared the sentencing judge had found no mitigating circumstances and some proper aggravating circumstances in Petitioner's case.

First, Petitioner suggests that the record reflects the sentencing Court may have found non-statutory mitigating circumstances and simply failed to set them out. Consequently, Barclay is not controlling on Petitioner's case, and the Eleventh Circuit inadvertently felt bound by the Barclay decision.

In addition, Petitioner would ask the Court to review this issue to determine if the consideration of non-statutory aggravating factors did destroy the "procedures that are designed to assure reliability in sentencing determinations".

IV. THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER INSTRUCTIONS TO THE JURY AT THE SENTENCING PHASE THAT A REASONABLE JUROR MIGHT WELL HAVE UNDERSTOOD TO LIMIT HIM OR HER TO ONLY THE STATUTORY MITIGATING FACTORS VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS.

This question is substantially the same as that presented in the Petitioner for Certiorari in Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983), cert. denied. Unlike Ford, there is nothing in this record that suggests the trial judge or the jury considered any non-statutory mitigating factors. At the time of the trial, Florida law limited consideration to statutory mitigating circumstances, and Petitioner's sentencing judge specifically

noted that he only followed statutory mitigating factors.

Petitioner claimed that the penalty phase instruction to the jury did not expressly inform the jury it could consider non-statutory mitigating circumstances, thereby leaving the jury with the contrary impression. The instruction was not objected to at trial nor was it raised on appeal.

Recently in identical circumstances, the Eleventh Circuit reviewed this issue on the merits. Foster v. Strickland, 707 F.2d 1139 (11th Cir. 1983). In Petitioner's case however, the panel imposed the high hurdles of Wainwright v. Sykes, 433 U.S. 72 (1977), and United States v. Frady, 456 U.S. 152 (1982). The Frady hurdle noted that Shriner had not established actual prejudice. In Foster, the Court reached the merits of this Eighth Amendment question, though it did find a lack of prejudice. But the Foster Court nevertheless reached the merits of the issue and judged it by a less restrictive, constitutional prejudice standard.

The Shriner panel should have employed the same procedure, but since it did not, Shriner now stands in direct conflict with Foster.

In addition to the foregoing, Wainwright v. Sykes should not have applied to bar this issue since Florida does not have a "contemporaneous objection" rule, or if it does, it is applied arbitrarily. The Florida Supreme Court does not in fact follow a consistent procedural default rule that can serve as "an independent and adequate state procedural ground that bars the federal courts from addressing the issue on habeas corpus." County Court of Ulster County v. Allen, 442 U.S. 140, 148 (1979). In his state post-conviction proceedings in Straight v. Wainwright, 422 So.2d 827 (Fla. 1982), the petitioner raised the same instructional error as that presented here. Straight's former counsel had committed the same procedural default as Shriner's. Yet in Straight, the Florida Supreme Court reached

the merits or the claim, 422 So.2d at 831.

This inconsistency, it turns out, is by no means rare. Compare Alvord v. State, 396 So.2d 184 (Fla. 1981); Smith v. State, 400 So.2d 956, 958-959 (Fla. 1981); Goode v. State, 403 So.2d 931, 932 (Fla. 1981); Dobbert v. State 409 So.2d 1053, 1058 (Fla. 1982); Demps v. State, 416 So.2d 808, 809 (Fla 1982); Songer v. State, 419 So.2d 1044, 1047 (Fla. 1982); Antone v. State, 410 So.2d 157, 163 (Fla. 1982); Thomas v. State, 421 So.2d 160, 162 (Fla. 1982) (court finds procedural defaults) with Douglas v. State, 373 So.2d 894, 896-897 (Fla. 1979); Adams v. State, 380 So.2d 423, 424 (Fla. 1980); Demps v. State, 416 So.2d at 809; Ruffin v. State, 420 So.2d 591, 594 (Fla. 1982); Hall v. State, 420 So.2d 872, 873-874 (Fla. 1982) (court reaches merits despite failure to raise issue on direct appeal).

In effect, Florida's procedural default "rule" is merely a device by which the state court can turn on or off at will its receptivity to constitutional claims. Barr v. City of Columbia, 378 U.S. 146, 149-150 (1964). See also NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 458 (1958). The result is that, when they subsequently present their constitutional claims in federal habeas corpus procedings, some death sentenced petitioners are able to obtain rulings on the merits while others are not. Since the determination of a capital sentencing issue on the merits can mean the difference between life and death, the lightning-like arbitrariness of Florida's procedural default "rule" cannot be sanctioned because it results in teh same random cruelty condemned in Furman v. Georgia, 408 U.S. 238 (1972).

Finally, the Eleventh Circuit's decision seems to state that since Shriner asked for death, he waived his right to attribute the jury's recommendation of death to the jury instruction, and that a "lack of prejudice" arose when Shriner requested death.

Since there can be no consent judgment of death,

Goode v. Wainwright, 704 F.2d 593 (11th Cir. 1983), there can be no waiver of errors in the trial merely because an accused requests death. And to equate a "request of death" with a "lack of prejudice" is nothing more than allowing an indirect consent judgment or death. Accordingly, the decision below should be reviewed without regard to Petitioner's request for death.

V. THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE SENTENCING COURT'S FAILURE TO SET FORTH MITIGATING FACTORS IT FOUND DEPRIVED PETITIONER OF THE RIGHT TO A MEANINGFUL REVIEW.

The Eighth Amendment requires appellate review in capital cases "to assure consistency, fairness, and rationality in the evenhanded operation of state law." Profitt v. Florida, 428 U.S. 260 (1976). At the cornerstone of this mandate is the key procedural safeguard that the findings in support of the death sentence be clearly set forth in writing in order to permit rational and meaningful appellate review. See, e.g., Zant v. Stephens, ____ U.S. ____ 103 S.Ct. 2733 (1983) ("identify it in writing"); Barclay v. Florida, ____ U.S. ____ 103 S.Ct. 3418 (1983) (U.S. June 28, 1983) (concurring opinion) ("specific written findings by the trial court, setting forth the facts underlying each aggravating and mitigating circumstance"). There could be no way for there to be the form of meaningful appellate review contemplated by the Eighth and Fourteenth Amendments--assuring consistency, fairness and proportionality--without a full revelation of all the factors relied upon by the sentencing court. All procedural safeguards would be for naught without the requirement of written findings. Accordingly,

> "Without full disclosure of the basis for the death sentence, the Florida capital-sentencing procedure would be subject to the defects which resulted in the holding of unconstitutionality in Furman v. Georgia."

Gardner v. Florida, 430 U.S. 349, 361 (1977). It is thus "important that the record on appeal disclose to the reviewing court the considerations which motivated the death sentence in

every case in which it is imposed" in order for a state to "administer its capital-sentencing procedures with an even hand." Id.

The sentencing court's order failed to set forth findings of fact with regard to the mitigating circumstances he found to exist. The sentencing judge's order indicates that he did find and consider mitigating circumstances in imposing the death sentence, though he did not specify which circumstances that he considered. The judge's sentencing order "finds that the aggravating circumstances far outweigh the mitigating circumstances." (RR 46).

The sentencing judge's order thus failed to fully disclose "the basis for the death sentence." There are very plausible mitigating factors present in this case, including alcohol and drug consumption, a harsh childhood, self inflicted wounds evincing emotional and mental problems, and the possibility of a third party being the actual killer.

The Eleventh Circuit recently vacated a death sentence under circumstances similar to the present case, where the sentencing court had failed to clearly set forth mitigating circumstances. Foster v. Strickland, 797 F.2d 1339, 1347-1350 (11th Cir. 1983). As the Court held:

> "The trial judge's failure to set forth findings of fact upon which his decision to impose the death sentence was based violates the concern for consistency and objectivity in death penalty sentencing. Absent more detailed findings..., we have 'no meaningful basis for distinguishing the...case in which [capital punishman] is imposed from... the many cases in which it is not.'"

Id. at 1350. The circumstances in Foster are quite analogous to those of the instant case, and thus Foster fully supports the necessity of setting aside Petitioner's death sentence for the inability to conduct "meaningful appellate review" and the lack of "consistently applied appellate review" in this case.

VI. THE FLORIDA SUPREME COURT'S SECRET, EX PARTE SOLICITATION, RECEIPT, AND CONSIDERATION OF REPORTS FROM STATE EXECUTIVE AGENCIES CONCERNING CAPITAL LITIGANTS WHOSE APPEALS WERE THEN PENDING FOR SENTENCING REVIEW PRESENT VITAL CONSTITUTIONAL QUESTIONS WHICH SHOULD BE RESOLVED BY THIS COURT.

The recent opinions of the court in Barclay on the operation of the Florida statute bear significantly on the Brown issue. In upholding the death sentence in Barclay despite the consideration of improper factors, both the plurality and concurring opinions relied on the role of the Florida Supreme Court in reviewing such sentences as an important safeguard. The plurality canvassed the Florida case law and concluded that "the Florida Supreme Court does not apply its harmless error rule in an automatic or mechanical fashion...[but] examine[s] the balance struck by the trial judge...." ____ U.S. at ____, 103 S.Ct. at 3427. The concurring opinion quoted this Court's understanding in Proffit v. Florida, 428 U.S. 242 (1976), that "the evidence of aggravating and mitigating circumstances is reviewed and reweighed by the Florida Supreme Court 'to determine independently whether the imposition of the ultimate penalty is warranted.'" ____ U.S. at ____, 103 S.Ct. at 3432 (quoting Proffitt, 428 U.S. at 253, and Songer v. State, 322 So.2d 481, 484 (1975)). But the conception of the role of the Florida Supreme Court in reviewing death sentences considered by the Eleventh Circuit and the Florida Supreme Court itself in Brown in upholding the ex parte practice now under challenge is diametrically opposed to the conception of that role held by this Court, reached only after studying the Florida case law.

Plainly, the receipt and consideration of sensitive, ex parte reports by the Florida Supreme Court could have and would have had a material impact on that court's role as a reweigher and reviewer of death sentences. Plainly, it violated the Constitution. "Because of the potential that the [re]sentencer might have rested its decision in part on erroneous or inaccurate

information that the defendant had no opportunity to explain or deny, the need for reliability in capital sentencing dictate[s] that the death penalty be reversed." California v. Ramos, ____ U.S. ____, 103 S.Ct. 3455, 77 L.Ed.2d 1171, (1983) (describing Gardner v. Florida, 430 U.S. 349 (1977)) (emphasis added).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U. S. Mail to JIM SMITH, Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida, this 9th day of December, 1983.

DANIEL T. O'CONNELL

Carl Elson SHRINER,
Petitioner-Appellant,

v.

Louie L. WAINWRIGHT,
Respondent-Appellee.

No. 82-5469.

United States Court of Appeals,
Eleventh Circuit.

Sept. 9, 1983.

Petitioner, who was convicted of first degree murder and sentenced to death in a Florida state court, appealed from an order of the United States District Court, for the Northern District of Florida, William Stafford, Chief Judge, which denied his petition for writ of habeas corpus. The Court of Appeals, Roney, Circuit Judge, held that: (1) given that petitioner, who received three full sets of *Miranda* warnings, wanted to terminate questioning only in relation to a robbery, state attorney could continue to ask petitioner questions about the murder without providing *Miranda* warnings; (2) in prosecution for murder, testimony of motel night clerk who identified petitioner as the robber and testified the gun he used closely resembled the murder weapon, which the state produced into evidence, was admissible under Florida law to prove identity; (3) even if state trial judge considered a nonstatutory aggravating factor, such error of state law did not rise to level of the constitutional violation requiring federal habeas corpus relief where sentencing judge found no mitigating circumstances and some proper aggravating circumstances.

Affirmed.

See also 386 So.2d 525.

1. Arrest ⇐63.4(12), 63.5(5)

Police had probable cause to stop petitioner, who bore a "striking resemblance" to suspect described in police bulletin, and take him into custody one day after the two crimes in the same county.

2. Criminal Law ⇐412.2(4)

Given that petitioner, who received three full sets of *Miranda* warnings, wanted questioning to terminate only in relation to a robbery, state attorney could continue to ask petitioner questions about the murder without providing *Miranda* warnings.

3. Criminal Law ⇐412.1(1)

Petitioner's inculpatory statements concerning a murder were not coerced or involuntary.

4. Criminal Law ⇐518(3), 519(7)

Use of handcuffs does not establish coercion with respect to a confession and an accused does not have to be continually reminded of his *Miranda* rights once he has knowingly waived them.

5. Criminal Law ⇐369.15

Under Florida law, like federal, evidence of other crimes is inadmissible to show defendant's bad character but is admissible to show, among other things, identity.

6. Criminal Law ⇐369.15

In prosecution for murder, testimony of motel night clerk who identified petitioner as the robber and testified the gun he used closely resembled the murder weapon,

APPENDIX

which the state produced into evidence, was admissible under Florida law to prove identity.

7. Criminal Law ⇐338(7)

Florida trial court, by precluding Methodist minister from testifying about the three electrocutions he witnessed, did not deny jury in murder trial evidence relevant to "evolving standards of decency" in contravention of *Lockett v. Ohio*.

8. Habeas Corpus ⇐113(13)

Petitioner, who was convicted of murder and sentenced to death in Florida state court, was not entitled to have record remanded so that he could engage in discovery as to whether Florida Supreme Court used any nonrecord information in his direct appeal.

9. Habeas Corpus ⇐30(3)

Petitioner, who was sentenced to death in Florida state court for murder, failed to establish actual prejudice resulting from jury's consideration of only statutory mitigating factors and therefore petitioner, who neither objected to instruction at trial concerning mitigating circumstances nor raised the point on direct appeal, was not entitled to federal habeas review of the issue.

10. Habeas Corpus ⇐45.2(4)

Even if state trial judge, who sentenced petitioner to death for murder, considered a nonstatutory aggravating factor, such error of state law did not rise to level of the constitutional violation requiring federal habeas corpus relief where sentencing judge found no mitigating circumstances and some proper aggravating circumstances.

11. Habeas Corpus ⇐30(3)

Petitioner, who was sentenced to death by Florida state court for murder, was not entitled to habeas corpus relief on basis of his claim that jury considered nonstatutory aggravating circumstances where petitioner did not raise the point on direct appeal and where there was nothing to show that jury relied on prosecutor's remarks.

Appeal from the United States District Court for the Northern District of Florida.

Before RONEY and KRAVITCH, Circuit Judges, and TUTTLE, Senior Circuit Judge.

RONEY, Circuit Judge:

Convicted of first degree murder and sentenced to death, Carl Elson Shriner appeals the denial of his petition for a writ of habeas corpus under 28 U.S.C.A. § 2254. Shriner seeks relief from his conviction on the grounds that the trial court improperly admitted into evidence a confession and evidence of other crimes. He attacks his sentence on the grounds that the trial court excluded proffered testimony of a clergyman as to electrocutions, the so-called Florida *Brown* issue, and the improper consideration of a nonstatutory aggravating circumstance. We affirm.

The facts that led to Shriner's conviction and sentence are chronicled in some detail in *Shriner v. State*, 386 So.2d 525, 527-28 (Fla.1980). We briefly outline them here. At 6:15 a.m. on October 22, 1976, James Grills entered a Majik Market in Gainesville, Florida and discovered the dead body of Judith Carter, the store clerk. Carter had been shot five times, and the Majik Market apparently had been robbed. Po-

lice, summoned to the scene, learned from two women who were the last known customers to enter the store that a young male patron had remained in the Majik Market after they left at approximately 1:30 a.m. earlier that day. Ninety minutes after the women had left the store, a young man with a hand gun had robbed a motel in Gainesville. Based on information provided by the motel clerk and the two women, the police prepared two composite sketches and a written description of a single suspect.

The following afternoon an Alachua County deputy sheriff stopped a car in which the passenger, Shriner, resembled the suspect's description. After advising Shriner of his *Miranda* rights and briefly questioning him, the deputy took Shriner down to the sheriff's office, where questioning continued with Shriner's apparent permission following another set of *Miranda* warnings. Shriner and the couple in whose home he lived consented to a search of the premises where the police discovered a revolver. When law enforcement officers matched the gun to projectiles found in the Majik Market, they took Shriner to the Gainesville Police Department.

After Shriner signed a written waiver following further *Miranda* warnings, questioning began at 9:00 p.m. on October 23. Shriner initially confessed to only the motel robbery and gave inconsistent statements about his involvement in the murder. At 2:00 a.m., however, he finally confessed to the murder.

An Alachua County jury found Shriner guilty of first degree murder and unanimously recommended the death penalty. The trial judge followed the jury's recommendation. On direct appeal, the Florida Supreme Court upheld both the conviction and sentence, *Shriner v. State*, 386 So.2d 525 (Fla.1980), and the United States Supreme Court denied Shriner's petition for certiorari. *Shriner v. State*, 449 U.S. 1103, 101 S.Ct. 899, 66 L.Ed.2d 829 (1981).

Shriner then filed a petition for habeas corpus in federal district court. When the district court denied relief in an unpublished opinion, Shriner appealed to this Court.

GUILT PHASE

Admission of the Confession

Shriner challenges the admission at trial of his confession on three grounds. First, he argues the police lacked probable cause to take him into custody and, therefore, the confession is the fruit of an unlawful detention. Second, he claims the police did not "scrupulously honor" his right to cut off questioning, thus violating his *Miranda* rights. Third, he asserts that under the "totality of circumstances," including the allegedly inordinate length of questioning, his statements were coerced and involuntary.

[1] As to the arrest, the police had probable cause to stop Shriner and take him into custody. The officer who stopped Shriner testified that he bore a "striking resemblance" to the suspect described in the police bulletin. The written description and composite sketches were based on information provided by three witnesses, all of whom were interviewed by the police. While Shriner claims there were significant discrepancies between the description and his appearance that day, the state judge credited the officer's testimony to the contrary. Findings of fact are entitled to a presumption of correctness in a federal habeas corpus proceeding. 28 U.S.C.A.

§ 2254(d); *Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981). The police encountered Shriner one day after the two crimes in the same county. With such a temporal and geographic proximity, a description by witnesses of a suspect may provide a sufficient basis for arresting an individual who closely resembles the description. *See, e.g., Chambers v. Maroney*, 399 U.S. 42, 46–47, 90 S.Ct. 1975, 1978–1979, 26 L.Ed.2d 419 (1970) (police had probable cause to arrest suspects whose clothing and car matched description).

Shriner's reliance on *Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979) is misplaced. In *Dunaway*, the Court held that police cannot take a suspect into custody for questioning in the absence of probable cause. *Id.* at 216, 99 S.Ct. at 2258. Here, the police had probable cause.

[2] Shriner's *Miranda* rights were not violated. From the time of his arrest, 4:00 p.m. on October 23, until his confession to murder, 2:00 a.m. the following morning, Shriner received three full sets of *Miranda* warnings, with the last occurring right before questioning began at 9:00 p.m. Shriner signed a written waiver of his rights at that time. He testified at the suppression hearing that, as a former convict, he understood the meaning of *Miranda* warnings. While Shriner claims to have requested an attorney prior to the 9:00 p.m. commencement of the questioning session, a law enforcement officer to whom Shriner allegedly made the request denied Shriner's assertion. At the hearing, Shriner could not remember whether he had requested an attorney during the questioning session, and the state attorney who conducted much of the questioning testified categorically that Shriner had not done so.

Although Shriner argues that, prior to his confession, he requested all questioning to cease, the state attorney who asked the questions testified at both the suppression hearing and at trial that he thought Shriner wanted questioning to terminate only in relation to the robbery. Significantly, Shriner offered no rebuttal testimony. Crediting the testimony of the government attorney, the state courts found that Shriner merely wanted to limit the subject matter, not end all questioning. *Shriner v. State*, 386 So.2d at 532. The record "fairly support[s]" this factual determination. 28 U.S.C.A. § 2254(d)(8).

Given that fact, the state attorney could continue to ask Shriner questions about the murder without providing further *Miranda* warnings. In *United States v. Vasquez*, 476 F.2d 730 (5th Cir.), *cert. denied*, 414 U.S. 836, 94 S.Ct. 181, 38 L.Ed.2d 72 (1973), the former Fifth Circuit denied the suppression of inculpatory statements made to government agents where the defendant, suspected of possessing an unregistered firearm, told police he did not want to discuss a shooting but agreed to answer questions about the rifle itself.

> When a person in custody has responded to proper police interrogation by voicing a general willingness to talk, subject only to a limited desire for silence, and his wishes not to discuss a particular subject-matter area are respected, nothing rooted in law or constitutional policy makes it improper to question him as to any unlimited subjects.

476 F.2d at 732–33 (footnote omitted). The Supreme Court has likewise indicated that the police do not in all circumstances have to cease all questioning once a suspect in any way exercises his *Miranda* rights.

> [Nothing] in the *Miranda* opinion can sensibly be read to create a per se proscription of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has indicated a desire to remain silent.

Michigan v. Mosley, 423 U.S. 96, 102–03, 96 S.Ct. 321, 325–26, 46 L.Ed.2d 313 (1975) (footnote omitted). The test is whether the state "scrupulously honored" defendant's right to cut off questioning. *Id.* at 104, 96 S.Ct. at 326 (quoting *Miranda v. Arizona*, 384 U.S. 436, 479, 86 S.Ct. 1602, 1630, 16 L.Ed.2d 694 (1966)). Here, the state complied fully with Shriner's only request: to terminate questioning as to the robbery. In short, the government "scrupulously honored" the only right Shriner exercised.

[3, 4] Shriner's inculpatory statements were not coerced or involuntary. Besides reasserting arguments that his requests for counsel and to end questioning were not heeded, Shriner offers little in support of his contention. Consistent with the testimony of the law enforcement officials, he does not claim on appeal that anyone threatened him or promised him anything in exchange for a confession. He merely notes that intensive questioning lasted for around five hours, during which period he remained handcuffed in a small room except for trips to use the lavatory, and that his girl friend was present in an adjacent room in an emotionally and physically distraught state. Shriner can hardly attribute his confession to a concern for his girl friend since he initially told the police she committed the murder. Neither has he established that the physical surroundings and length of questioning without new *Miranda* warnings overcame his "will . . . and capacity for self-determination." *Schneckloth v. Bustamonte*, 412 U.S. 218, 225, 93 S.Ct. 2041, 2047, 36 L.Ed.2d 854 (1973) (quoting *Culombe v. Connecticut*, 367 U.S. 568, 602, 81 S.Ct. 1860, 1879, 6 L.Ed.2d 1037 (1961) (Frankfurter, J.)). Shriner equivocated at the suppression hearing as to whether he ever told the law enforcement officials he felt tired. The use of handcuffs does not establish coercion, *United States v. Ogden*, 572 F.2d 501, 502 (5th Cir.), *cert. denied*, 439 U.S. 979, 99 S.Ct. 564, 58 L.Ed.2d 650 (1978), and an accused does not have to be continually reminded of his *Miranda* rights once he has knowingly waived them. *Biddy v. Diamond*, 516 F.2d 118, 122 (5th Cir.), *cert. denied*, 425 U.S. 950, 96 S.Ct. 1724, 48 L.Ed.2d 194 (1976); *United States v. Anthony*, 474 F.2d 770, 773 (5th Cir.1973). The trial court properly denied Shriner's motion to suppress his confession.

Admission of Evidence of Robbery

[5, 6] At the murder trial, the state called as a witness the motel night clerk who, over Shriner's objection, identified Shriner as the robber and testified that the gun he used closely resembled the murder weapon, which the state produced into evidence. Under Florida law, like federal, evidence of other crimes is inadmissible to show defendant's bad character, but is admissible to show, among other things, identity. *Ashley v. State*, 265 So.2d 685, 693 (Fla.1972); *Williams v. State*, 117 So.2d 473, 475–76 (Fla.1960). The Florida Supreme Court in Shriner's direct appeal succinctly explained why the evidence was admissible to establish identity:

> The following facts adduced at trial make apparent the relevancy of this evidence: (1) police found a .38 caliber gun and cartridges in [Shriner's] residence; (2) ballistics expert Bollenbach identified the gun found in [Shriner's] residence as the murder weapon; (3) at 3:00 a.m., only

> ninety minutes after Judith Carter's murder, a man robbed the 8 Days Inn.... Thus, the evidence of the 8 Days Inn robbery, if believed by the jury, *places the murder weapon in the hands of [Shriner] within ninety minutes of Judith Carter's demise.* Such evidence is clearly probative of the murderer's identity.

Shriner v. State, 386 So.2d at 532–33 (emphasis in original) (footnotes omitted). Shriner asserts no reason why introduction of the extrinsic crime evidence, given its admissibility as a matter of evidence law, violated the Constitution.

SENTENCING PHASE

Exclusion of Proffered Testimony by Clergyman as to Electrocutions

[7] Shriner claims that the trial court, by precluding a Methodist minister from testifying about the three electrocutions he witnessed, denied the jury evidence relevant to "evolving standards of decency," in contravention of *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). Shriner misreads *Lockett*. While the plurality opinion indicated that a defendant in a capital case must be permitted to introduce virtually any evidence relating to his character, record or offense, it did not hold that all evidence proffered by the defendant concerning the propriety of electrocutions in general must be admitted. Rather, the plurality explicitly admonished:

> Nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense.

Id. at 604 n. 12, 98 S.Ct. at 2965 n. 12. The exclusion, on relevancy grounds, of the minister's proffered testimony, which did not at all concern Shriner's background or the crime committed, did not violate *Lockett*.

Florida Supreme Court's Solicitation and Collection of Extra Record Material (The Brown Issue)

[8] As one of the petitioners in *Brown v. Wainwright*, 392 So.2d 1327 (Fla.), *cert. denied*, 454 U.S. 1000, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981), Shriner unsuccessfully attacked the constitutionality of the Florida Supreme Court's alleged use of nonrecord information in appeals of capital convictions. Shriner acknowledges he has no proof that the Florida Supreme Court used any nonrecord information in his direct appeal, and asks us to remand to the district court so he can engage in pertinent discovery. This point is controlled by *Ford v. Strickland*, 696 F.2d 804 (11th Cir.1983) (en banc). We specifically rejected the sort of discovery Shriner seeks here.

Failure to Consider Nonstatutory Mitigating Factors

Shriner asserts the (1) jury, (2) trial judge, and (3) Florida Supreme Court considered only statutory mitigating factors, in violation of *Eddings v. Oklahoma*, 455 U.S. 104, 110, 102 S.Ct. 869, 874, 71 L.Ed.2d 1 (1982).

[9] As to the jury, Shriner argues that the trial judge, by not expressly informing the jury it could consider nonstatutory mitigating circumstances, left the jury with the contrary impression. The jury instruction on aggravating and mitigating circumstances went, in pertinent part, as follows:

> The aggravating circumstances which you may consider are limited to such of the following as may be established by

> the evidence [whereupon the court read the aggravating circumstances in the statutory language].
>
> The mitigating circumstances you may consider, established by the evidence, are as follows [whereupon the court read the mitigating circumstances in the statutory language].

Shriner neither objected to the instruction at trial nor raised the point on direct appeal. This procedural default precludes federal habeas review on this issue unless excused for cause and prejudice. *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). We need not decide whether cause exists because Shriner has not established actual prejudice as required by *United States v. Frady*, 456 U.S. 152, 170, 102 S.Ct. 1584, 1596, 71 L.Ed.2d 816 (1982).

First, Shriner himself asked the jury to show no mercy and to sentence him to death. Accordingly, his lawyer did not argue to the jury any mitigating circumstances specific to Shriner. Given this situation, Shriner cannot attribute the jury's recommendation of death to the jury instruction. Second, the jury instruction is quite similar to that in *Ford v. Strickland*, 696 F.2d at 811-12, where we found insufficient prejudice to excuse the procedural default.

After the jury recommended death, Shriner did an about-face, asking the judge for life and arguing what he felt were mitigating circumstances. Shriner argues that the judge's sentencing order indicates he did not consider nonstatutory mitigating factors.

There is no indication in the record or briefs that Shriner raised this issue on his direct appeal. The Florida Supreme Court's opinion in the appeal nowhere mentions the issue. The failure to raise an issue on appeal, no less than at trial, may amount to a waiver of the point in a federal habeas proceeding. *See, e.g., Evans v. Maggio*, 557 F.2d 430 (5th Cir.1977).

In any event, the district court properly disposed of this argument as follows:

> It does not appear that [trial] Judge Green limited his consideration of mitigating factors to only those specifically enumerated in the statute. Judge Green found psychiatrist's reports diagnosing Shriner as a "sociopathic personality" insufficient to constitute a mitigating circumstance, since in his view Shriner's capacity was not diminished. The Florida Supreme Court, upon review of the record and the same pre-sentence investigation material, also found no mitigating circumstances. There is likewise no indication that the Florida Supreme Court limited its review to the absence of only statutory mitigating circumstances. Indeed, the Court specifically holds "[t]he record also supports the finding of no mitigating circumstances." *Shriner v. State*, 386 So.2d 525, 534 (Fla.1980).

It appears clear to us that the trial judge and the Florida Supreme Court considered everything in determining whether a life sentence would be more appropriate than a death sentence, given the statutory base for capital punishment. That the Florida courts found the evidence of mitigating circumstances unpersuasive does not mean they improperly ignored it, but rather signifies they performed their task to weigh the evidence. *Cf. Eddings v. Oklahoma*, 455 U.S. 104, 114-15, 102 S.Ct. 869, 876-77, 71 L.Ed.2d 1 (1982) ("The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence."). There is nothing in this record to indicate that either the trial or appellate court thought any alleged-

ly mitigating evidence could not be considered in the sentencing process.

Consideration of Nonstatutory Aggravating Circumstances

[10] Shriner argues the trial judge improperly considered a nonstatutory aggravating factor when he mentioned in his sentencing remarks and written order Shriner's poor prison disciplinary record. It is unclear, however, whether the trial judge considered Shriner's disciplinary record to be an aggravating factor or whether, having already found two statutory aggravating factors potentially warranting the death penalty, he considered Shriner's record merely to see if any mitigating factors existed. The judge correctly instructed the jury that, under Florida law, only the aggravating factors enumerated in the statute could be considered, and one might assume the judge followed his own instruction.

Even if the judge considered a nonstatutory aggravating factor, this error of state law does not rise to the level of a constitutional violation requiring federal habeas corpus relief. The United States Supreme Court has twice this term upheld a death sentence even though the sentencer considered an invalid aggravating circumstance. *Barclay v. Florida*, — U.S. —, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983); *Zant v. Stephens*, — U.S. —, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). *Barclay* is particularly on point. That case, like this one, involved the alleged consideration by a state trial judge, applying the Florida death penalty statute, of a nonstatutory aggravating factor. As in *Barclay*, the sentencing judge here found no mitigating circumstances and some proper aggravating circumstances. He did not consider as aggravating any constitutionally protected conduct.

In upholding the sentence in *Barclay*, the United States Supreme Court treated the consideration of the nonstatutory factor as purely a matter of state law, indicating that a death sentence may be constitutional despite being based on both statutory and nonstatutory aggravating factors. *Id.* — U.S. at —, 103 S.Ct. at 3426-28 (plurality opinion) (citing *Proffitt v. Florida*, 428 U.S. 242, 256, 96 S.Ct. 2960, 2968, 49 L.Ed.2d 913 (1976); *id.* — U.S. at —, 103 S.Ct. at 3432 (Stevens, J., concurring). *See also Stephens*, — U.S. at —, 103 S.Ct. at 2743, 77 L.Ed.2d at 251. The plurality deemed particularly significant the Florida Supreme Court's review of death sentences, especially its careful and restrained use of a harmless error rule:

> [The state cases] indicate that the Florida Supreme Court does not apply its harmless error analysis in an automatic or mechanical fashion, but rather upholds death sentences on the basis of this analysis only when it actually finds that the error is harmless. There is no reason why the Florida Supreme Court cannot examine the balance struck by the trial judge and decide that the elimination of improperly considered aggravating circumstances could not possibly affect the balance.... "What is important ... is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." [*Stephens*, — U.S. at —, 103 S.Ct. at 2743] (emphasis in original).

Barclay, — U.S. at —, 103 S.Ct. at 3428.

In the present case, the Florida Supreme Court viewed any error as harmless. It reasoned that even if the trial judge did

improperly consider Shriner's prison record in aggravation, he would have reached the same result anyway because two legitimate statutory aggravating factors existed without any mitigating factors to counterbalance them. *Shriner v. State*, 386 So.2d at 534. In light of *Barclay*, this Court cannot overturn this harmless error determination. If anything, *Barclay* presented a stronger case for holding the death penalty arbitrary because there, unlike here, the jury recommended a life sentence.

The Florida courts satisfied the constitutional requirement to make an "individualized determination on the basis of the character of the individual and the circumstances of the crime." *Barclay*, — U.S. at —, 103 S.Ct. at 3428 (quoting *Zant v. Stephens*, — U.S. —, —, 103 S.Ct. 2733, 2944, 77 L.Ed.2d 235, 251 (1983)). The state trial judge reviewed presentence reports regarding Shriner, and the one allegedly improper factor considered by the judge involved Shriner's record.

[11] Focusing largely on the prosecutor's comment at closing argument that Shriner had created a great risk of death to many people in the robbery of the motel, a separate crime from the murder, Shriner finally claims the jury considered nonstatutory aggravating circumstances. First, because Shriner did not raise this point on direct appeal to the Florida Supreme Court, there is a procedural default. *See, e.g., Ford v. Strickland*, 696 F.2d at 816–17. Second, with a properly instructed jury, there is nothing to show the jury relied on the prosecutor's remarks. *Cf. Grizzell v. Wainwright*, 692 F.2d 722, 726–27 (11th Cir.1982) (jury is presumed to follow judge's instructions as to evidence it may consider), *cert. denied*, — U.S. —, 103 S.Ct. 2129, 77 L.Ed.2d — (U.S.1983). Third, since Shriner himself asked the jury to show no mercy and to sentence him to death, he cannot attribute the jury's recommendation of death to any comment by the prosecutor. Shriner's argument as to the unconstitutionality of the jury's consideration is of no avail.

Conclusion

There having been no constitutional infirmity in the state proceedings, either in the trial phase or sentencing phase, the district court properly denied the petition for a writ of habeas corpus.

AFFIRMED.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

US COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
NOV 2 1983

No. 82-5469

CARL ELSON SHRINER,

Petitioner-Appellant,

versus

LOUIS WAINWRIGHT,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Florida

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O R D E R :

( ) The motion of APPELLANT for [X] stay [ ] recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

(XX) The motion of APPELLANT for [XX] stay [ ] recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including DECEMBER 12, 1983 the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of _____ for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of _____ for a further stay of the issuance of the mandate is DENIED.

/s/ PAUL H. RONEY
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 82-5469

CARL ELSON SHRINER,

Petitioner-Appellant,

versus

LOUIS WAINWRIGHT,

Respondent-Appellee.

- - - - - - - - - - - - - -

Appeal from the United States District Court for the Northern District of Florida

- - - - - - - - - - - - - -

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion September 9, 1983, 11 Cir., 198_, _____F.2d_____).

(NOVEMBER 4, 1983)

Before RONEY and KRAVITCH, Circuit Judges, and TUTTLE, Senior Circuit Judge.

PER CURIAM:

(XXX) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ PAUL H. RONEY
United States Circuit Judge

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

(1) Separate proceedings on issue of penalty.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) Findings in support of sentence of death.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) Review of judgment and sentence.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) Aggravating circumstances.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) Mitigating circumstances.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capital of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

Amended by Laws 1972, c. 72-724, § 9, eff. Dec. 8, 1972. Amended by Laws 1974, c. 74-379, § 1, eff. Oct. 1, 1974; Laws 1977, c. 77-104, § 248, eff. Aug. 2, 1977; Laws 1977, c. 77-174, § 1, eff. Aug. 2, 1977; Laws 1979, c. 79-353, § 1, eff. July 3, 1979.

Laws 1972, c. 72-724, § 9, substantially rewrote this section.

Laws 1974, c. 74-379, § 1, added the third sentence to subsec. (1).

Laws 1977, c. 77-101, a reviser's bill, corrected errors and deleted obsolete or expired provisions. See Reviser's Note—1977.

Laws 1977, c. 77-174, a reviser's bill, amended this section to reflect language editorially inserted by the division of statutory revision and indexing.

Laws 1979, c. 79-353, substituted in the fifth sentence of subsec. (1) "to the nature of the crime and the character of the defendant" for "to sentence", deleted in subsecs. (2)(b) and (3)(b) "as enumerated in subsection (6)", and added subsec. (8)(i).

Reviser's Note—1977:

Conforms internal references to editorial renumbering of subsections created by s. 9, ch. 72-724, Laws of Florida.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

CARL ELSON SHRINER,

Petitioner,

vs. CASE NO: 83-9897

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections,

Respondent.

83-5897

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, CARL ELSON SHRINER, by his undersigned counsel, asks leave to file the Petition for Writ of Certiorari submitted herewith without payment of costs and fees and to proceed in forma pauperis. Petitioner's affidavit in support of this request is attached hereto as Exhibit "A".

DATED this 14th day of December, 1984.

Respectfully submitted,

Daniel T. O'Connell

DANIEL T. O'CONNELL
O'Connell and Hulslander
33 North Main Street
Gainesville, FL 32601
(904) 373-9141
Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished a true and correct copy of the foregoing pleading upon Respondent by U. S. Mail, addressed to JIM SMITH, Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida, 32301, this 14th day of December, 1984.

Daniel T. O'Connell

DANIEL T. O'CONNELL

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

82-5897

CARL ELSON SHRINER,

Petitioner,

vs. CASE NO: 83-9897

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections,

Respondent.

_____/

AFFIDAVIT IN SUPPORT OF MOTION FOR
LEAVE TO PROCEED IN FORMA PAUPERIS

I, CARL ELSON SHRINER, being first duly sworn, depose and say that I am the Petitioner in the above-entitled case; that in support of my motion for leave to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting are true:

1. Are you presently employed?

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   No

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

   1971 420.00

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other source? No

   a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? No

   a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing?) No

   a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Carl E. Shriner
AFFIANT, CARL ELSON SHRINER

SWORN TO AND SUBSCRIBED before me this
20 day of December, 198 .

Bernie Hannigle
Notary Public, State of Florida at Large

My Commission Expires:

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

83-5897

NO. 80-

CARL ELSON SHRINER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT ORF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JIM SMITH
ATTORNEY GENERAL

CAROLYN M. SNURKOWSKI
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COUNSEL FOR RESPONDENT

QUESTIONS PRESENTED

1. WHETHER THE STATE "SCRUPULOUSLY HONORED" PETITIONER'S FIFTH AMENDMENT RIGHT TO CUT OFF QUESTIONING, WHERE, AFTER APPROXIMATELY EIGHT HOURS OF INTERROGATION, PETITIONER REQUESTED NO FURTHER QUESTIONING AND THE INTERROGATION MERELY STOPPED FOR A "MINUTE OR TWO" AND THEN RESUMED WITHOUT ANY ADDITIONAL MIRANDA WARNINGS OR WAIVER?

2. WHETHER THE TESTIMONY OF A PRIEST WHO HAD WITNESSED AN EXECUTION BY ELECTROCUTION SHOULD HAVE BEEN PRECLUDED FROM THE JURY AS IT DENIED PETITIONER THE BENEFIT OF THE JUDGMENT OF THE COMMUNITY IN VIOLATION OF THE EIGHTH AMENDMENT?

3. DOES THE CONSIDERATION OF NONSTATUTORY AGGRAVATING FACTORS IN IMPOSING A SENTENCE OF DEATH CONFLICT WITH THE RELIABILITY REQUIRED FOR CAPITAL SENTENCING BY THE EIGHTH AND FOURTEENTH AMENDMENTS?

4. DID THE ELEVENTH CIRCUIT ERR IN UPHOLDING JURY INSTRUCTIONS THAT A REASONABLE JUROR MIGHT WELL HAVE UNDERSTOOD TO PRECLUDE CONSIDERATION OF NONSTATUTORY MITIGATING CIRCUMSTANCES THROUGH:

(i) A DISREGARD OF SANDSTROM V. MONTANA, 442 U.S. 510 (1979), THUS CREATING A CONFLICT WITH THE FIFTH CIRCUIT'S CONDEMNATION OF IDENTICAL JURY INSTRUCTIONS IN WASHINGTON V. WATKINS, 665 F.2D 1346 (5TH CIR. 1981), CERT. DENIED, 456 U.S. 949 (1982); AND

(ii) A FAILURE TO RECOGNIZE THAT INSTRUCTIONAL ERROR UNDER LOCKETT V. OHIO, 438 U.S. 586 (1978), INFECTS A CAPITAL SENTENCING TRIAL WITH PREJUDICE SUFFICIENT TO SATISFY THE REQUIREMENTS OF WAINWRIGHT V. SYKES, 433 U.S. 72 (1977), AND UNITED STATES V. FRADY, 456 U.S. 152 (1982)?

5. DOES THE FAILURE OF THE SENTENCING COURT TO SET FORTH MITIGATING FACTORS IT FOUND, DEPRIVE A DEFENDANT OF THE RIGHT TO MEANINGFUL REVIEW?

6. DOES THE FLORIDA SUPREME COURT'S SYSTEMATIC, SECRET, EX PARTE SOLICITATION AND CONSIDERATION OF EXTRA-RECORD, PRISON-GENERATED PSYCHOLOGICAL EVALUATIONS

QUESTIONS PRESENTED
CONTINUED

AND SIMILAR MATERIALS OF QUESTIONABLE RELIABILITY CONCERNING CAPITAL APPELLANTS IN CASES PENDING BEFORE IT FOR SENTENCING REVIEW VIOLATE THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS?

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-

CARL ELSON SHRINER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Respondent, Louie L. Wainwright, prays that the Petitioner's Petition for Writ of Certiorari be denied.

PREFACE

Respondent accepts Petitioner's Citations To Opinions Below, Jurisdiction and Constitutional and Statutory Provisions Involved found on pages 1-2 of Petitioner's petition.

In accepting Petitioner's jurisdictional statement Respondent does not concede any merit to the issues raised but rather acknowledges Petitioner's authorization to proceed with said pleadings.

STATEMENT OF THE CASE

The Statement of the Case provided by Petitioner is unacceptable in that the statement is argumentative and therefore inappropriate.

The facts and statement of the case as set out in Shriner v. Wainwright, 715 F.2d 1452 (11th Cir. 1983) rehearing denied November 4, 1983 provide an excellent recital of those facts and circumstances germane to the issues before this court. (See Petitioner's Appendix Shriner v. Wainwright, supra):

> Convicted of first degree murder and sentenced to death, Carl Elson Shriner appeals the denial of his petition for a writ of habeas corpus under 28 U.S.C.A. §2254. Shriner seeks relief from his conviction on the grounds that the trial court improperly admitted into evidence a confession and evidence a confession and evidence of other crimes. He attacks his sentence on the grounds that the trial court excluded proffered testimony of a clergyman as to electrocutions, the so-called Florida Brown issue, and the improper consideration of a nonstatutory aggravating circumstance. We affirm.
>
> The facts that led to Shriner's conviction and sentence are chronicled in some detail in Shriner v. State, 386 So.2d 525, 527-28 (Fla. 1980). We briefly outline them here. At 6:15 a.m. on October 22, 1976, James Grills entered a Majik Market in Gainesville, Florida and discovered the dead body of Judith Carter, the store clerk. Carter had been shot five times, and the

Majik Market apparently had been robbed. Police, summoned to the scene, learned from two women who were the last known customers to enter the store that a young male patron had remained in the Majik Market after they left at approximately 1:30 a.m. earlier that day. Ninety minutes after the women had left the store, a young man with a hand gun had robbed a motel in Gainesville. Based on information provided by the motel clerk and the two women, the police prepared two composite sketches and a written description of a single suspect.

The following afternoon an Alachua County deputy sheriff stopped a car in which the passenger, Shriner, resembled the suspect's description. After advising Shriner of his Miranda rights and briefly questioning him, the deputy took Shriner down to the sheriff's office, where questioning continued with Shriner's apparent permission following another set of Miranda warnings. Shriner and the couple in whose home he lived consented to a search of the premises where the police discovered a revolver. When a law enforcement officers matched the gun to projectiles found in the Majak Market, they took Shriner to the Gainesville Police Department.

After Shriner signed a written waiver following further Miranda warnings, questioning began at 9:00 p.m. on October 23. Shriner initially confessed to only the motel robbery and gave inconsistent statements about his involvement in the murder. At 2:00 a.m., however, he finally confessed to the murder.

An Alachua County jury found Shriner guilty of first degree murder and unanimously recommended the death penalty. The trial judge followed the jury's recommendation. On direct appeal, the Florida Supreme Court upheld both the conviction and sentence, Shriner v. State, 386 So.2d 525 (Fla. 1980), and the United States Supreme Court denied Shriner's petition for certiorari. Shriner v. State, 449 U.S. 1103, 101 S.Ct. 899, 66 L.Ed. 2d 829 (1981).

Shriner then filed a petition for habeas corpus in federal district court. When the district court

denied relief in an unpublished opinion, Shriner appealed to this Court.

Additional facts found in Shriner v. State, 386 So.2d 525, 527-528 (Fla. 1980) present further details of the historical events. (See Respondent's Appendix I).

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I

Petitioner first contends the Eleventh Circuit in Shriner v. Wainwright, supra, erroneously concluded that his rights were "scrupulously honored" pursuant to the Fifth Amendment and this Court's opinions in Miranda v. Arizona, 348 U.S. 436 (1966) and Michigan v. Mosley, 423 U.S. 96 (1979).

Initially, it is important to note that this identical issue was raised by Petitioner in his first Petition for Writ of Certiorari To the Supreme Court of Florida in Shriner v. State, 449 U.S. 1103 (1981). Petitioner has presented nothing new or demonstrated that the law has significantly changed warranting reconsideration of this matter by this Court.

The Eleventh Circuit in addressing this claim noted:

> Shriner challenges the admission at trial of his confession on three grounds. First, he argues the police lacked probable cause to take him into custody and, therefore, the confession is the fruit of an unlawful detention. Second, he claims the police did not "scrupulously honor" his right to cut

> off questioning, thus violating his Miranda rights. Third, he asserts that under the "totality of circumstances," including the allegedly inordinate length of questioning, his statements were coerced and involuntary.

The Court first concluded that the historical facts discerned by the state trial court that the police officers had probable cause to arrest Petitioner were entitled to a presumption of correctness pursuant to 28 U.S.C.A. 2254 (d) and Sumner v. Mata, 449 U.S. 539 (1981). The Court observed that Chambers v. Maroney, 399 U.S. 42 (1970) controlled and that reliance on Dunaway v. New York, 442 U.S. 200 (1979) was misplaced.

Next the Eleventh Circuit held:

> Although Shriner argues that, prior to his confession, he requested all questioning to cease, the state attorney who asked the questions testified at both the suppression hearing and at trial that he thought Shriner wanted questioning to terminate only in relation to the robbery. Significantly, Shriner offered no rebuttal testimony. Crediting the testimony of the government attorney, the state courts found that Shriner merely wanted to limit the subject matter, not end all questioning. Shriner v. State, 386 So.2d at 532. The record "fairly support[s]" this factual determination. 28 U.S.C.A. §2254(d)(8).
>
> Given that fact, the state attorney could continue to ask Shriner questions about the murder without providing further Miranda warnings. In United States v. Vasquez, 476 F.2d 730 (5th Cir.), cert.denied, 414 U.S. 836, 94 S.Ct. 181, 38 L.Ed.2d 72 (1973), the former Fifth Circuit denied the suppression of inculpatory statements made to government agents where the defendant, suspected of possessing an unregistered firearm, told police he did not want to discuss a shooting but agreed to answer questions about the rifle itself.

> When a person in custody has responded to proper police interrogation by voicing a general willingness to talk, subject only to a limited desire for silence, and his wishes not to discuss a particular subject-matter area are respected, nothing rooted in law or constitutional policy makes it improper to question him as to any unlimited subjects.

476 F.2d at 732-33 (footnote omitted). The Supreme Court has likewise indicated that the police do not in all circumstances have to cease all questioning once a suspect in any way exercises his Miranda rights.

> [Nothing] in the Miranda opinion can sensibly be read to create a per se proscription of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has indicated a desire to remain silent.

Michigan v. Mosley, 423 U.S. 96, 102-03, 96 S.Ct. 321, 325-26, 46 L.Ed.2d 313 (1975)(footnote omitted). The test is whether the state "scrupulously honored" defendant's right to cut off questioning. Id. at 104, 96 S.Ct. at 326 (quoting Miranda v. Arizona, 384 U.S. 436, 479, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)). Here, the state complied fully with Shriner's only request: to terminate questioning as to the robbery. In short, the government "scrupulously honored" the only right Shriner exercised.

Shriner v. Wainwright, 715 F.2d at 1455.

Lastly, the court reviewed Petitioner's argument that the inculpatory statements were coerced or involuntary and concluded that said statements were not coerced and voluntarily made. See, Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

II

Petitioner next contends the Eleventh Circuit erred in not reversing due to the State's failure to allow him to present evidence of "evolving standards of decency" through the excluded testimony of a clergyman who had witnessed a number of executions. Specifically Petitioner argues this Court's decision in Lockett v. Ohio, 438 U.S. 586 (1978) was violated at the penalty phase of his trial due to the alleged limitation concerning mitigating evidence.

The Court finding no Lockett violation held:

> Shriner claims that the trial court, by precluding a Methodist minister from testifying about the three electrocutions he witnessed, denied the jury evidence relevant to "evolving standards of decency," in contravention of Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). Shriner misreads Lockett. While the plurality opinion indicated that a defendant in a capital case must be permitted to introduce virtually any evidence relating to his character, record or offense, it did not hold that all evidence proffered by the defendant concerning the propriety of electrocutions in general must be admitted. Rather, the plurality explicitly admonished:
>
> > Nothing in his opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense.
>
> Id. at 604 n. 12, 98 S.Ct. at 2965 n. 12. The exclusion, on relevancy grounds, of the minister's proffered testimony, which did not at all concern Shriner's background or the crime committed, did not violate Lockett.
>
> Shriner v. Wainwright, 715 F.2d at 1456.

Moreover, while the evolving standards of decency may in a specific case be considered relevant mitigating evidence, in the instant case neither a showing that said evidence was relevant nor the actual proffer of what Reverend Gene Parks would testify to would support the admission of said evidence before the jury.

III

Petitioner argues that the improper consideration of non-statutory aggravating circumstances requires further review by this Court. Recognizing the importance of Barclay v. Florida, ___U.S.___, 103 S.Ct. 3418 (1983), Petitioner argues the factual distinction of that case to his makes Barclay inapplicable. Respondent would submit Barclay is controlling in that matters concerning whether the trial court improperly considered non-statutory aggravating are State law questions which do not rise to a level of a constitutional violation.

> The United States Supreme Court has twice this term upheld a death sentence even though the sentencer considered an invalid aggravating circumstance. Barclay v. Florida, ___U.S.___, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983); Zant v. Stephens, ___U.S.___, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). Barclay is particularly on point. That case, like this one, involved the alleged consideration by a state trial judge, applying the Florida death penalty statute, of a nonstatutory aggravating factor. As in Barclay, the sentencing judge here found no mitigating circumstances and some proper aggravating circumstances. He did not consider as aggravating any constitutionally protected conduct.
>
> In upholding the sentence in Barclay, the United State Supreme treated the consideration of the nonstatutory factor as purely a

matter of state law, indicating that a death sentence may be constitutional despite being based on both statutory and nonstatutory aggravating factors.

* * *

In the present case, the Florida Supreme Court viewed any error as harmless. It reasoned that even if the trial judge did improperly consider Shriner's prison record in aggravation, he would have reached the same result anyway because two legitimate statutory aggravating factors existed without any mitigating factors to counterbalance them. Shriner v. State, 386 So.2d at 534. In light of Barclay, this Court cannot overturn this harmless error determination. If anything, Barclay presented a stronger case for holding the death penalty arbitrary because there, unlike here, the jury recommended a life sentence.

The Florida courts satisfied the constitutional requirement to make an "individualized determination on the basis of the character of the individual and the circumstances of the crime." Barclay, ___U.S. at____, 103 S.Ct. at 3428 (quoting Zant v. Stephens, __U.S.___,____, 103 S.Ct. 2733, 2944, 77 L.Ed.2d 235, 251 (1983)). The state trial judge reviewed presentence reports regarding Shriner, and the one allegedly improper factor considered by the judge involved Shriner's record.

Shriner v. Wainwright, 715 F.2d at 1458-1459.

IV

Petitioner next argues relief should be granted because "at the time of the trial, Florida law limited consideration to statutory mitigating circumstances. . ." Petitioner acknowledges that no objection was raised concerning the instructions that were provided but argues that inspite of Wainwright v. Sykes, 433 U.S. 72 (1977) or United States v. Frady, 456 U.S. 152 (1982), the procedural default rule

should not apply and no cause and actual prejudice should have to be demonstrated.

> As to the jury, Shriner argues that the trial judge, by not expressly informing the jury it could consider nonstatutory mitigating circumstances, left the jury with the contrary impression. The jury instruction on aggravating and mitigating circumstances went, in pertinent part, as follows:
>
> The aggravating circumstances which you may consider are limited to such of the following as may be established by the evidence [whereupon the court read the aggravating circumstances in the statutory language].
>
> The mitigating circumstances you may consider, established by the evidence, are as follows [whereupon the court read the mitigating circumstances in the statutory language].
>
> Shriner neither objected to the instruction at trial nor raised the point on direct appeal. This procedural default precludes federal habeas review on this issue unless excused for cause and prejudice. Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). We need not decide whether cause exists because Shriner has not established actual prejudice as required by United States v. Frady, 456 U.S. 152, 170, 102 S.Ct. 1584, 1596, 71 L.Ed.2d 816 (1982).
>
> First, Shriner himself asked the jury to show no mercy and to sentence him to death. Accordingly, his lawyer did not argue to the jury any mitigating circumstances specific to Shriner. Given this situation, Shriner cannot attribute the jury's recommendation of death to the jury instruction. Second, the jury instruction is quite similar to that in Ford v. Strickland, 696 F.2d at 811-12, where we found insufficient prejudice to excuse the procedural default.
>
> After the jury recommended death, Shriner did an about-face, asking the judge for life and arguing what he felt were mitigating circumstances. Shriner argues that the

> judges sentencing order indicates he did not consider nonstatutory mitigating factors.
>
> There is no indication in the record or briefs that Shriner raised this issue on his direct appeal. The Florida Supreme Court's opinion in the appeal nowhere mentions the issue. The failure to raise an issue on appeal, no less than at trial, may amount to a waiver of the point in a federal habeas proceeding. See, e.g., Evans v. Maggio, 557 F.2d 430 (5th Cir. 1977).
>
> * * *
>
> It appears clear to us that the trial judge and the Florida Supreme Court considered everything in determining whether a life sentence would be more appropriate than a death sentence, given the statutory base for capital punishment. That the Florida courts found the evidence of mitigating circumstances unpersuasive does not mean they improperly ignored it, but rather signifies they performed their task to weigh the evidence. Cf. Eddings v. Oklahoma, 455 U.S. 104, 114-115, 102 S.Ct. 869, 876-77, 71 L.Ed.2d 1 (1982)("The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence.") There is nothing in this record to indicate that either the trial or appellate court thought any allegedly mitigating evidence could not be considered in the sentencing process.
>
> Shriner v. Wainwright, 715 F.2d at 1457-1458.

See also Shriner v. State, 386 So.2d 525 at 534.

Where as here, Petitioner cannot satisfy the cause and actual prejudice requirements of Wainwright v. Sykes, supra, Petitioner has not and cannot assert entitlement to relief where the Eleventh Circuit similarly concluded no relief was warranted. See also Wainwright v. Goode, 34 Crim.L. 4101 (November 28, 1983 Case No. 83-131).

Petitioner contends that reversal is required because the "sentencing court's order failed to set forth findings of fact with regard to the mitigating circumstances he found to exist." Respondent would submit Petitioner's assertion is groundless for at least two reasons.

First, this specific issue has never been raised before either in a state or federal court. Pursuant to Cardinale v. Louisiana, 394 U.S. 437 (1969) the matter is not properly before the court.

Second, assuming arguendo that the issue is reviewable, the State trial court's findings of aggravating and mitigating circumstances for the imposition of the death penalty reveal the court found no mitigating circumstances. In Shriner v. State, 386 So.2d at 533-534 the court opined:

> The court finds, with the possible exception of number six above, there are no mitigating circumstances in this case. An examination of the psychiatric evaluation in this case, found both in the pre-sentence investigation from the Department of Offender Rehabilitation and by the various psychiatrists appointed to represent this defendant prior to trial, he had been diagnosed as a "psychopathic personality". An examination of these reports, however, does not lead one to the conclusion that his capacities diminish thereby.
>
> The court finds that the aggravating circumstances far outweigh the mitigating circumstances.
>
> In addition, an examination of the pre-sentence investigation, which was made available in its entirety, including the confidential section, to the attorney for the defense, prior to sentencing, indicates that during the defendant's incarceration at the Department of Offender

> Rehabilitation, he has presented a disciplinary problem and to some degree a security risk. The investigation further shows that he has engaged in a long pattern of violent criminal conduct. In addition, it is apparent that the robbery that was committed in the perpetration of the death of Judith Ann Carter was not the sole robbery committed by this defendant subsequent to his release from prison some three weeks prior to the date of the offense.
>
> As a preliminary matter, the record is replete with evidence to support the judge's finding of aggravating circumstances number two and four. The record also supports the finding of no mitigating circumstances. It is not clear, however, whether the judge considered Appellant's disciplinary record as an aggravating circumstance. Even it we assume that the disciplinary problem was so treated, the error was harmless. We have here two valid aggravating circumstances counterbalanced by no mitigating circumstances. Since death is presumed in this situation improper consideration of a non-statutory factor does not render the sentence invalid. . . (emphasis added).

Clearly, Petitioner's assertion that the trial court's order "failed to fully disclose 'the basis for the death sentence,'" is without support in law or in fact.

VI

Lastly, Petitioner resurrects the Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981), cert. den. 454 U.S. 1000 (1981) issue claiming that the Florida Supreme Court violated his rights because of the court's "systematic ex parte solicitation and collection of nonrecord material." This issue has been before this Court on a number of occasions and each time certiorari has been denied.

More recently this Court in Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983), cert. den., 104 S.Ct. 201 (1983) denied review where this claim was at the very heart of the petition for writ of certiorari.

The Eleventh Circuit in following its earlier en banc decision in Ford v. Strickland, supra, held herein:

> [8] As one of the petitioners in Brown v. Wainwright, 392 So.2d 1327 (Fla.) cert. den., 454 U.S. 1000, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981), Shriner unsuccessfully attacked the constitutionality of the Florida Supreme Court's alleged use of nonrecord information in appeals of capital convictions. Shriner acknowledges he has no proof that the Florida Supreme Court used any nonrecord information in his direct appeal, and asks us to remand to the district court so he can engage in pertinent discovery. This point is controlled by Ford v. Strickland 696 F.2d 804 (11th Cir. 1983)(en banc). We specifically rejected the sort of discovery Shriner seeks here.
>
> Shriner v. Wainwright, 715 F.2d at 1456-1457. (emphasis added).

Petitioner's last claim is without merit.

CONCLUSION

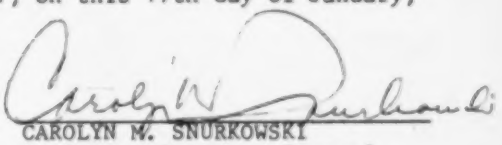
Based on the foregoing reasons, Respondent would respectfully urge this Court deny Petitioner's Petition for Writ of Certiorari.

JIM SMITH
Attorney General

CAROLYN M. SNURKOWSKI
Assistant Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT was furnished by mail to DANIEL T. O'CONNELL, O'Connell and Hulslander, 33 North Main Street, Gainesville, Florida 32601, on this 17th day of January, 1984.



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ss/

APPENDIX

Florida Bar v. Vernell, 374 So.2d 473 (Fla. 1979), which is analogous to the present disciplinary proceeding, we said:

> This Court deals more severely with cumulative misconduct than with isolated misconduct. *The Florida Bar v. Rubin*, 362 So.2d 12 (Fla.1978). In view of Vernell's prior breaches of professional discipline and his cumulative misconduct in the present case, we hold that a suspension is appropriate. *See The Florida Bar v. Solomon*, 338 So.2d 818 (Fla.1976).

374 So.2d at 476.

[2] We likewise find under the circumstances of the case before us, a six-month suspension with proof of rehabilitation is warranted by Greenspahn's cumulative misconduct and prior disciplinary record.

Accordingly, we hereby suspend Melvyn Greenspahn from the practice of law for a period of six months, effective June 16, 1980. Greenspahn is further directed to pay the costs of these proceedings in the amount of $1,107.00.

It is so ordered.

ENGLAND, C. J., and OVERTON, SUNDBERG, ALDERMAN and McDONALD, JJ., concur.

BOYD, J., concurs in part and dissents in part with an opinion, with which ADKINS, J., concurs.

BOYD, Justice, concurring in part and dissenting in part.

I would favor the recommendation of the referee providing for a three-month suspension with automatic reinstatement together with payment of costs.

ADKINS, J., concurs.

Carl Elson SHRINER, Appellant,

v.

STATE of Florida, Appellee.

No. 51749.

Supreme Court of Florida.

May 22, 1980.

Rehearing Denied Aug. 27, 1980.

Defendant was convicted before the Circuit Court, Alachua County, R. A. Green, Jr., J., of murder in the first degree and sentenced to death, and he appealed. The Supreme Court held that: (1) sketches attached to police be-on-lookout bulletin bore striking resemblance to defendant, thus furnishing deputy sheriff with reasonable grounds to believe that defendant had committed robberies and to arrest defendant; (2) review of record supported conclusions that when defendant indicated during questioning that he wanted to terminate questioning, he wanted to terminate questioning only insofar as it related to other robbery about which defendant was being questioned, and that assistant state attorney respected defendant's partial exercise of his *Miranda* privilege and restricted further questioning to other areas; (3) interrogation of defendant was thus properly continued and defendant's confession after further questioning to murder for which he was prosecuted in this case was properly admitted at trial; (4) evidence of hotel robbery placed murder weapon in hands of defendant within 90 minutes of victim's murder and thus was clearly probative of murderer's identity and admissible to prove identity; (5) evidence of descriptive account of electrocution would not have aided judge or jury in making determination of whether to impose sentence of death on defendant and thus exclusion of such evidence was not error; (6) record supported judge's findings of two aggravating circumstances and no mitigating circumstances; and (7) possible improper consideration of nonstatutory aggravating circumstance did not render sentence invalid.

Affirmed.

1. Arrest ⇐63.4(2)

Law enforcement officer has probable cause to arrest if he has reasonable grounds to believe that person arrested has committed felony; facts constituting probable cause need not meet standard of conclusiveness and probability required of circumstantial facts upon which conviction must be based.

2. Arrest ⇐63.4(12)

Where sketches attached to police be-on-lookout bulletin bore striking resemblance to defendant, deputy sheriff had reasonable cause to believe that defendant had committed robberies, and thus to arrest defendant.

3. Criminal Law ⇐412.2(3)

If law enforcement officers fail to give specified *Miranda* warnings before interrogation or fail to follow *Miranda* guidelines during interrogation, statement thus derived may be suppressed, even though otherwise wholly voluntary.

4. Criminal Law ⇐414

Review of testimony of assistant state attorney who questioned defendant and absence of rebuttal evidence to contrary support conclusions that when defendant indicated during questioning that he wanted to terminate questioning, he wanted to terminate questioning only insofar as it related to other robbery about which defendant was being questioned, and that assistant state attorney respected defendant's partial exercise of his *Miranda* privilege and restricted further questioning to other areas.

5. Criminal Law ⇐412.1(4)

Supreme Court does not approve of any practice by which suspect's express desire to remain silent as to some specific activity is aborted by subterfuge of questioning which is designed or intended to indirectly gain information about those matters which he has indicated he wishes not to discuss.

6. Criminal Law ⇐1158(4)

Where record was bare of any perfidious police practices in obtaining defendant's confession and considering lack of contradictory evidence in defendant's testimony at motion to suppress, Supreme Court would not overturn trial judge's finding of voluntariness of defendant's confession.

7. Criminal Law ⇐517.2(1)

Where assistant state attorney who questioned defendant respected defendant's partial exercise of his *Miranda* privilege, as to other robbery about which defendant was being questioned, and restricted further questioning to other areas, interrogation was properly continued, and thus defendant's confession after further questioning to murder for which he was being prosecuted was properly admitted at trial.

8. Criminal Law ⇐369.1, 371(1, 12), 372(1)

Evidence of other crimes is inadmissible if offered solely for purpose of showing bad character or propensity; however, evidence of other crimes is admissible if it casts light of character of act under investigation by showing either motive, intent, absence of mistake, common scheme, identity or system or general pattern of criminality so that evidence of such other crimes would have relevant or material bearing upon some essential aspect of offense then being tried.

9. Criminal Law ⇐369.2(1)

Relevancy is test for admission of evidence of other crimes; if proffered evidence is relevant for any purpose other than to show bad character or propensity, it should be admitted.

10. Criminal Law ⇐369.15

Where police found .38-caliber gun and cartridges in defendant's residence, ballistics expert identified such gun as murder weapon, 90 minutes after murder hotel was robbed, and hotel clerk identified defendant as culprit and testified that gun used in robbery closely resembled murder weapon, evidence of hotel robbery, if believed by jury, placed murder weapon in hands of defendant within 90 minutes of victim's murder, and thus was clearly probative of murderer's identity and admissible to prove identity.

11. Criminal Law ⇐986.2(1)

While in making determination whether to impose sentence of death, advisory jury and trial judge may consider evidence of mitigating factors beyond those enumerated in statute, such evidence must be relevant to sentencing inquiry. West's F.S.A. § 921.141(6).

12. Criminal Law ⇐986.2(3)

Evidence of descriptive account of electrocution would not have aided jury or judge in their efforts to determine whether sentence of death should have been imposed on defendant and thus exclusion of such evidence was not error. West's F.S.A. § 921.141.

13. Criminal Law ⇐986.2(1)

Record supported judge's findings of two aggravating circumstances and no mitigating circumstances in making determination as to whether sentence of death should have been imposed on defendant. West's F.S.A. § 921.141(5)(b, d), (6).

14. Criminal Law ⇐1177

Even if judge considered defendant's disciplinary record as aggravating circumstance in determining whether to impose sentence of death on defendant, such error was harmless, since there were two valid aggravating circumstances counterbalanced by no mitigating circumstances, and thus death was presumed to be proper sentence and possible improper consideration of nonstatutory factor did not render such sentence invalid. West's F.S.A. § 921.141(5)(b, d).

Daniel T. O'Connell of O'Connell & Hulslander, Gainesville, for appellant.

Jim Smith, Atty. Gen., and A. S. Johnston, Asst. Atty. Gen., Tallahassee, for appellee.

PER CURIAM.

Appellant, Carl Elson Shriner, was convicted of one count of murder in the first degree. The jury recommended and the trial judge imposed a sentence of death. Jurisdiction vests in this Court pursuant to article V, section 3(b)(1), Florida Constitution. We affirm the conviction and sentence.[1]

The following facts came to light at trial. At approximately 1:30 a. m. on Friday, October 22, 1977, two young women entered a Gainesville convenience store (Majik Market). Two other persons were in the store at that time, the store clerk, Judith Carter, and a male customer. The women made their purchases ahead of the male customer and departed. The man was in his mid-twenties, of medium height, slender; he had a receding hairline, medium to dark brown collar-length hair, dark eyes, a mustache and a three-to-four-day-old beard.

At 6:15 a. m. the same morning, James Grills went into the Majik Market and discovered the dead body of Judith Carter. He summoned police who arrived at about 6:30 a. m. Gainesville police investigator Mason photographed the scene and recovered three projectiles from the store. Associate district medical examiner Clark later recovered two projectiles from the body.

Alachua County deputy sheriff Denson went on duty Saturday at 3:30 p. m., October 23, 1976, and received a be-on-lookout bulletin (BOLO) with a written description and two composite sketches attached. The description and sketches were based in part on information obtained from the two young women at the Majik Market and on an eyewitness account of an armed robbery which took place early Friday morning at an 8 Days Inn. At 4:00 p. m. that Saturday, deputy Denson stopped opposite a car at a stop sign. The passenger in the car matched the description in the BOLO. Denson stopped the car, advised the passenger of his *Miranda*[2] rights and asked him

1. References to specific pages in the record will be designated as follows: record on appeal, R; supplemental record on appeal, SR; Trial transcript, TT; red-bound transcript of 2/3/77 hearing, TH.

2. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

some questions. After learning that the passenger had recently been released from prison, Denson took him into custody. The passenger was Carl Shriner.

Upon arrival at the Alachua County sheriff headquarters, detectives readvised appellant of his *Miranda* rights. Appellant signed in four separate places a form constituting an acknowledgment of understanding of *Miranda* rights, a waiver of the right to have an attorney present during questioning, a consent to be interviewed and a consent to make a statement. Shriner gave his local address as 1223 Northeast Eighteenth Avenue, where he and Carol Griffis lived at the home of John and Nancy Rapp. John Rapp was the driver of the car in which appellant was apprehended. Shriner had an Arizona driver's license bearing the name Carl Elson Shriner and the address 514 W. Buist, Phoenix, Arizona, and $338 in his wallet.

A gunman robbed the 8 Days Inn in Gainesville at about 3:00 a. m. Friday, October 22, 1976,[3] under the following circumstances. While waiting for the security guard to leave the immediate area, a man asked the clerk for a room and filled out a guest registration form. He robbed the clerk and took the form with him, but not before the clerk had removed two of the five copies. It was signed "Rob E. Williams, 514 W. Buist, Phoenix, Ariz." The motel clerk identified appellant as the culprit in a photo lineup and at trial.[4]

At the sheriff's office appellant signed a written consent to search the portion of the Rapp residence occupied by him. After John and Nancy Rapp consented in writing to a search of the remainder of their home, the police discovered a Smith and Wesson .38 caliber revolver hidden in a chair in the Rapp children's living room. FBI firearms identification expert Bollenbach took possession of the gun and the five projectiles found in the Majik Market and determined conclusively that the projectiles were fired from that gun.[5]

3. TT 641.

4. TT 651, 655.

5. TT 636.

Appellant was taken to the Gainesville Police Department at 7:30 p. m., Saturday, October 23, 1976. He signed a waiver and consent form after being readvised of his *Miranda* rights. Numerous law enforcement officers and an assistant state attorney participated in the ensuing interrogation, which continued from 9:00 p. m. until 2:45 a. m. the following morning. Appellant first offered to Sergeant Blitch a number of inconsistent accounts of his knowledge of the murder and confessed only to the 8 Days Inn robbery. At approximately 1:00 a. m. Sunday, October 24, 1976, during questioning by assistant state attorney Nilon and with Blitch out of the room, Shriner made some equivocal statements evincing an apparent desire to terminate questioning about the 8 Days Inn robbery.[6] Nilon proceeded to other subjects and the interrogation continued. At 2:00 a. m., with Sergeant Blitch present, appellant confessed to the murder of Judith Carter.

[1, 2] Appellant presents a plethora of issues for our consideration, several of which do not merit discussion. His first colorable contention is that his arrest was illegal because of a lack of probable cause. We disagree. A law enforcement officer has probable cause to arrest if he has reasonable grounds to believe that the person arrested has committed a felony. *State v. Outten*, 206 So.2d 392, 397 (Fla.1968). The facts constituting probable cause need not meet the standard of conclusiveness and probability required of the circumstantial facts upon which a conviction must be based. *Id.* Here, the sketches attached to the police BOLO bore a striking resemblance to appellant, thus furnishing deputy Denson with reasonable grounds to believe that appellant had committed the robberies.

[3] Of considerably greater difficulty is whether, although otherwise voluntary, Shriner's confession must be suppressed be-

6. The facts surrounding this episode will be fully explored later in this opinion.

cause of his claim that the police persisted in questioning him after he indicated an unwillingness to answer questions on a particular subject. Appellant relies upon the following language in *Miranda v. Arizona*, 384 U.S. 436, 473–74, 86 S.Ct. 1602, 1627–1628, 16 L.Ed.2d 694:

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. [Footnote omitted.]

Miranda required exclusion of any statements stemming from custodial interrogation unless the prosecution demonstrated compliance with its specific prophylactic safeguards.[7] If law enforcement officers fail to give the specified warnings before interrogation or fail to follow the *Miranda* guidelines during interrogation, the statement thus derived may be suppressed, even though otherwise "wholly voluntary." *Michigan v. Mosley*, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975); *Michigan v. Tucker*, 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974).

In *Michigan v. Mosley*, police questioning was held proper even though the accused had earlier indicated his desire to remain silent. The Supreme Court rejected a strict rule which would totally preclude all further custodial interrogation.[8] At the same time it observed that to construe *Miranda* to require only a pause in questioning, with a resumption of interrogation after only a momentary respite, would effectively undermine the will of the accused:

> Clearly, therefore, neither this passage nor any other passage in the *Miranda* opinion can sensibly be read to create a *per se* proscription of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has indicated a desire to remain silent.
>
> A reasonable and faithful interpretation of the *Miranda* opinion must rest on the intention of the Court in that case to adopt "fully effective means . . . to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored . . ." 384 U.S., at 479, 86 S.Ct. at 1630. The critical safeguard identified in the passage at issue is a person's "right to cut off questioning." *Id.*, at 474, 86 S.Ct. at 1627. Through the exercise of his option to terminate questioning he can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation. The requirement that law enforcement authorities must respect a person's exercise of that option counteracts the coercive pressures of the custodial setting. We therefore conclude that the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his "right to cut off questioning" was "scrupulously honored."

423 U.S. at 102–04, 96 S.Ct. at 326 (Footnotes omitted).

Turning to the facts here, it appears that during interrogation by assistant state attorney James Nilon, Shriner indicated a desire to stop talking about the 8 Days Inn robbery. At the hearing on the motion to suppress Nilon described the episode in this way:

Direction Examination:

Q. During any of that period of time that you were in his presence did he ever ask to have an attorney present?

A. No, sir, he did not.

7. *United States v. Charlton*, 565 F.2d 86, 89 (6th Cir. 1977), *cert. denied*, 434 U.S. 1070, 98 S.Ct. 1253, 55 L.Ed.2d 773 (1978).

8. *Id.*

Q. Did he ever ask to stop talking or remain silent?

A. Yes, to a certain extent. What he did, in the first conversation that I had with him after Investigator Blitch had left the room, particularly in reference to the 8 Days Inn robbery, he told me certain things that had happened in the 8 Days Inn robbery and when I asked him particularly about the gun that he used in the 8 Days Inn robbery he said to me something to the effect, "Well, right now it's like I'm crazy. It's like I'm nuts." I said, "Well, Mr. Shriner . . ." I don't remember what I said, but I said, "It's not like you mean you are insane." He said, "No." I said, "You mean you don't want to answer any more questions?" And he said, "Yes." I just sat there for a minute. I think at that point I asked him something about his family background and he answered that, and that's the only time I can think of he even alluded to the fact that he didn't want to answer any questions or make any further statements or anything.

TH 100–101.

Cross-Examination:

Q. All right. Let me go back to one of the statements that Mr. Shriner is giving—and it was kind of at the end of Mr. Hebert's direct examination—you said that during one of the times you were talking to Mr. Shriner concerning the weapon or the gun, he made the statement to you something about, "I'm crazy" or "Stop. I'm crazy."

A. Yes, sir.

Q. Kind of vague. We are not sure as to the terminology that was used. The word crazy was used, though.

A. Crazy or nuts. It's like I'm crazy or nuts." And I interpreted that to mean, "It's like I'm not really nuts, but for your sake and, you know, in answering these questions, further questions, it's like I'm nuts to you."

Q. Was he saying he was just getting confused or tired?

A. My impression was that he was saying, like, from now on out as far as concerning the gun and specifics of the 8 Days Inn robbery, it was like he was insane, that, you know, the answers would be like a crazy man. I got the impression he was saying, "Don't bother asking me any more questions about that."

Q. I believe you said on direct examination—did he say, "I don't want to answer any more questions"?

A. He never told me specifically like, "I don't want to answer any more questions," that I can remember.

Q. Did you get the impression he didn't want to answer any more questions?

A. About that part of the incident, yes, about the 8 Days Inn and where he got the gun and things of that nature and any more specifics, yes, but then we sat there for a minute or two and I asked him some other questions. I think it was about his personal . . .

Q. About his family and personal things.

A. Yes, and he just answered and we started another conversation and he had no problem.

TH 107–108.

At trial Mr. Nilon offered this account:

Cross-Examination:

Q. At the point in time that you are talking to him now concerning the Eight Days Inn, I believe there was a little incident that took place, and you are talking to Mr. Shriner, and I believe that Mr. Shriner seemed to indicate to you that he did not want to talk, he was having problems. My understanding is did he use the words "I am crazy" or "I am having problems". Do you remember the thing that I am talking about?

A. Yes, I do.

Q. Okay. There was some problem at this point in time, was there not, in the interview room, that existed between Mr. Shriner and yourself as to this interrogation?

A. I don't know what you mean by a problem. There was a point in time that he made some of the statement that you are talking about.

Q. Can you be more specific about that, please?

A. Yes, I can. I had gotten some information from one of the investigators, and I can't tell you which one because there were a number of them, prior to going into the room concerning a piece of paper, I think it was a registration that the person who had committed the robbery had signed before he or as he was pulling the robbery giving an Arizona address. I started questioning Mr. Shriner about signing the registration and did he sign his address or his parents' address, and he, I don't want to say smile, but he had kind of a smirk or a grin on his face and said that "I am crazy." I said, "Do you mean by that that you are actually, you know, out of your mind or crazy?" And I don't remember whether he answered that or not.

I said, "Well you mean you don't want to answer any more questions about that?" And he said, "Yeah."

Q. Okay. But there was some problem at this point in time, he did not want to talk about it?

MR. HEBERT [state attorney]: The State objects, Your Honor. The words speak for themselves. What counsel calls a problem, the witness has already said that he doesn't know what that means but he is telling what happened.

MR. KEARNS [defense counsel]: I will rephrase the question, Your Honor.

THE COURT: The objection is moot by the question being withdrawn.

BY MR. KEARNS:

Q. He did not want to talk about that particular area, did he?

A. No, he did not.

Q. Now, based upon that response, did you inquire as to whether or not he wished to continue?

A. No, sir. At that point in time there was about a minute or two lull or lapse and that is when I started talking about personal things.

Q. Okay. Then you started going on about this personal family things?

A. Yes. At that point in time, during those conversations, I really terminated conversations about any offenses.

TT 720–722.

Redirect Examination:

Q. Now, you mentioned that he mentioned to you that he didn't want to talk about it, he gave you an impression that he didn't want to talk about the specifics of the folio. Did he have any objections about going on and talking about other things?

A. Specific—I am sorry, I didn't understand.

Q. All right. Mr. Kearns talked about the thing called problems sometime—

A. Yes.

Q. —where the defendant said or you asked him about the folio, signing it, and he said, "I am nuts," and you said, "You just don't want to talk about it any more." You didn't talk to him any more about the folio; is that correct?

A. No, I dropped that subject.

Q. Okay. Did he have any problem talking about anything else?

A. No, sir.

Q. Did he ever say that he didn't want to talk about anything else?

A. No, sir.

Q. Did he freely and voluntarily answer other questions that you asked him?

A. Yes, sir. As I stated before, there was about a minute or two lull period where we just sat there and I said—well, I might have started something like, "Carl, where are you from?" And then we started about personal matters that I have already testified to.

Q. All right. Now, during that time when he was making the admissions of guilt to you, "I shot her, why I shot her," did he ever stop or tell you that he wanted to stop talking about it?

A. No, sir.

Q. Or that he wanted a lawyer?

A. No, sir.

TT 727–28.

Appellant testified in his own behalf at the motion to suppress but made no mention of any desire to terminate questioning.

[4–7] We are satisfied that, based on Mr. Nilon's testimony and the absence of rebuttal evidence to the contrary, the trial judge correctly concluded that appellant wanted to terminate questioning only insofar as it related to the 8 Days Inn robbery. We are similarly satisfied that Mr. Nilon respected appellant's partial exercise of his *Miranda* privilege and restricted further questioning to other areas. Given this posture, the police did not run afoul of *Miranda* and *Mosley* by continuing the interrogation:

> When a person in custody has responded to proper police interrogation by voicing a general willingness to talk, subject only to a limited desire for silence, and his wishes not to discuss a particular subject-matter area are respected, nothing rooted in law or constitutional policy makes it improper to question him as to any unlimited subjects.[9]

United States v. Vasquez, 476 F.2d 730, 732–33 (5th Cir. 1973); *accord*, *Smith v. United States*, 505 F.2d 824 (6th Cir. 1974); *United States v. Matthews*, 417 F.Supp. 813 (E.D.Pa.), *aff'd.*, 547 F.2d 1165 (3d Cir. 1976), *cert. denied*, 429 U.S. 1111, 97 S.Ct. 1148, 51 L.Ed.2d 565 (1977).

Hence, appellant's confession was properly admitted at trial.

[8, 9] Appellant next asserts error in the admission of evidence relating to the 8 Days Inn robbery. He properly cites *Williams v. State*, 117 So.2d 473 (Fla.1960), for the proposition that evidence of other crimes is inadmissible if offered solely for the purpose of showing bad character or propensity. However, *Williams* does permit evidence of other crimes

> if it casts light on the character of the act under investigation by showing either motive, intent, absence of mistake, common scheme, identity or a system or general pattern of criminality so that the evidence of such other crimes would have a relevant or material bearing upon some essential aspect of the offense then being tried.

Ashley v. State, 265 So.2d 685, 693 (Fla. 1972).

Relevancy is the test; if the proffered evidence is relevant for any purpose other than to show bad character or propensity, it should be admitted. *Id.*

[10] We concur in the trial judge's ruling that evidence of the 8 Days Inn robbery was admissible to prove identity. The following facts adduced at trial make apparent the relevancy of this evidence: (1) police found a .38 caliber gun and cartridges

9. We also concur with the Circuit Court's footnote # 2 to the above statement, 476 F.2d at 733:

> We certainly do not intimate approval of any practice by which a suspect's express desire to remain silent as to some specific activity is aborted by the subterfuge of questioning which is designed or intended to indirectly gain information about those matters which he has indicated he wishes not to discuss. However, this record is bare of any perfidious police practices. And considering the lack of contradictory evidence in Shriner's testimony at the motion to suppress, we would be irresponsible to overturn the trial judge's finding of voluntariness. *See Cooper v. State*, 336 So.2d 1133 (Fla.1976), *cert. denied*, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977).

in appellant's residence; [10] (2) ballistics expert Bollenbach identified the gun found in appellant's residence as the murder weapon; [11] (3) at 3:00 a. m., only ninety minutes after Judith Carter's murder, a man robbed the 8 Days Inn. The hotel clerk identified appellant as the culprit and testified that the gun used in the robbery closely resembled the murder weapon.[12] Thus, the evidence of the 8 Days Inn robbery, if believed by the jury, *places the murder weapon in the hands of appellant within ninety minutes of Judith Carter's demise.* Such evidence is clearly probative of the murderer's identity.

[11, 12] The remaining issues involve the sentencing phase of the trial. Appellant's constitutional attack on the death penalty has been thoroughly canvassed in prior decisions and found groundless. *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *Alford v. State*, 307 So.2d 433 (Fla.1975), *cert. denied*, 428 U.S. 912, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976); *State v. Dixon*, 283 So.2d 1 (Fla.1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). Equally meritless is the contention that it was error to exclude the testimony of a priest who had witnessed an execution by electrocution. While it is settled that an advisory jury and trial judge may consider evidence of mitigating factors beyond those enumerated in section 921.141(6), Florida Statutes (1977),[13] the evidence must be relevant to the sentencing inquiry. We do not believe that a descriptive account of an electrocution would aid the jury or judge in their effort to apply section 921.141 fairly and correctly. Indeed, such evidence would more likely serve to distort and obfuscate the sentencing process.

Appellant contends finally that his death sentence is fatally defective because the judge considered nonstatutory aggravating circumstances. The relevant portions of the judge's findings are as follows:

The question occurs as to whether death or life imprisonment should be the verdict of this Court. Using the statutory guidelines of mitigating circumstances as opposed to aggravating circumstances, the Court finds under aggravating circumstances the following:

1. Whether the Defendant was under sentence of imprisonment when he committed the murder for which he was convicted. This case does not fit this guideline.

2. Whether the Defendant has previously been convicted of another capital felony or of a felony involving the use of or threat of violence to the person.

The Defendant CARL ELSON SHRINER was convicted of the offense of Armed Robbery in Dade County in 1972. He served a five-year sentence in the Department of Offender Rehabilitation for this act.

3. Whether in committing the murder for which he has just been convicted, the Defendant knowingly created a great risk of death to many persons. This guideline is not applicable to this case.

4. Whether the murder for which the Defendant was convicted was committed while he was engaged in the commission of or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, aircraft piracy or the unlawful throwing, placing or discharging of a destructive bomb or device.

The evidence shows in this case that the Defendant killed Judith Ann Carter while perpetrating robbery.

The following are statutory mitigating circumstances which have been considered:

1. Whether the Defendant has no significant history of prior criminal activity.

10. TT 611.

11. TT 636.

12. TT 641-56.

13. *See Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); *Proffitt v. Florida*, *supra*; *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978), *cert. denied*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979).

2. Whether the murder was committed while Defendant was under the influence of extreme mental or emotional disturbance.

3. Whether the victim was a participant in the Defendant's conduct or consented to the acts.

4. Whether the Defendant was an accomplice in the murder committed by another person and the Defendant's participation was relatively minor.

5. Whether the Defendant acted under extreme duress or under the substantial domination of another person.

6. Whether the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

7. The age of the Defendant at the time of the crime.

The Court finds, with the possible exception of No. 6 above, there are no mitigating circumstances in this case. An examination of the psychiatric evaluation in this case, found both in the presentence investigation from the Department of Offender Rehabilitation and by the various psychiatrists appointed to represent this Defendant prior to trial, he has been diagnosed as a "sociopathic personality". An examination of these reports, however, does not lead one to the conclusion that his capacity is diminished thereby.

The Court finds that the aggravating circumstances far outweigh the mitigating circumstances.

In addition, an examination of the presentence investigation, which was made available in its entirety, including the confidential section, to the attorney for the Defendant prior to sentencing, indicates that during the Defendant's incarceration at the Department of Offender Rehabilitation, he has presented a discipline problem and to some degree a security risk. The investigation further shows that he has engaged in a long pattern of violent criminal conduct. In addition, it is apparent that the robbery that was committed in perpetration of the death of Judith Ann Carter was not the sole robbery committed by this Defendant subsequent to his release from prison some three weeks prior to the date of the offense.

[13, 14] As a preliminary matter, the record is replete with evidence to support the judge's finding of aggravating circumstances numbered two and four.[14] The record also supports the finding of no mitigating circumstances. It is not clear, however, whether the judge considered appellant's disciplinary record as an aggravating circumstance. Even if we assume that the disciplinary problem was so treated, the error was harmless. We have here two valid aggravating circumstances counterbalanced by no mitigating circumstances. Since death is presumed in this situation,[15] improper consideration of a nonstatutory factor does not render the sentence invalid:

> It appears that the United States Supreme Court does not fault a death sentence predicated in part upon nonstatutory aggravating factors *where there are no mitigating circumstances*. The absence of mitigating circumstances becomes important, because, so long as there are *some* statutory aggravating circumstances, there is no danger that nonstatutory circumstances have served to overcome the mitigating circumstances in the weighing process which is dictated by our statute.

Elledge v. State, 346 So.2d 998, 1002–03 (Fla.1977) (emphasis in original).

Accordingly, the judgment of guilt and the sentence of death are affirmed.

It is so ordered.

ENGLAND, C. J., and ADKINS, BOYD, OVERTON, SUNDBERG and ALDERMAN, JJ., concur.

14. § 921.141(5)(b) and (d), Fla.Stat. (1977).

15. "When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances . . . ." *State v. Dixon*, 283 So.2d at 9.